Supreme Court, U.S.
FILED
JAN 23 2002
CLERK

(5)

No. 01-912

In The

Supreme Court of the United States

VISHNUE I. JENNINGS,

Petitioner,

vs.

KELLOGG USA, INC. AND
AMERICAN FEDERATION OF GRAIN MILLERS,
LOCAL NO. 50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT KELLOGG COMPANY'S BRIEF IN OPPOSITION

MARK E. MCQUEEN
BERENS & TATE, P.C.
10050 Regency Cir., Suite 400
Omaha, Nebraska 68114
(402) 391-1991
Counsel of Record for Respondent, Kellogg Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11188

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the Order of the United States District Court for the District of Nebraska granting Respondent's Motion for Summary Judgment.

II. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the Order issued by the United States District Court for the District of Nebraska denying Petitioner's request for a court-appointed attorney.

III. Whether the Order issued by the United States District Court for the District of Nebraska and affirmed by the United States Court of Appeals for the Eighth Circuit denying Petitioner's request for a jury trial and dismissing Petitioner's Title VII action violated rights guaranteed the Petitioner under the Constitution of the United States of America.

CORPORATE DISCLOSURE STATEMENT

Respondent, Kellogg Company, is a publicly held company, is the parent company, and owns 100 percent of the stock for Kellogg USA, Inc. There are no publicly held companies that own 10 percent or more of Kellogg Company's stock.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 5

A. THE TRIAL COURT PROPERLY GRANTED RESPONDENT KELLOGG'S MOTION FOR SUMMARY JUDGMENT 5

B. THE TRIAL COURT PROPERLY REFUSED TO APPOINT AN ATTORNEY TO REPRESENT THE PETITIONER 17

C. THE TRIAL COURT PROPERLY DENIED THE PETITIONER'S DEMAND FOR JURY TRIAL ... 19

D. THE TRIAL COURT'S DISMISSAL OF PETITIONER'S TITLE VII SUIT DID NOT VIOLATE PETITIONER'S DUE PROCESS OR EQUAL PROTECTION RIGHTS 21

E. PETITIONER'S WRIT OF CERTIORARI IS PREMISED ON MULTIPLE MATERIAL MISREPRESENTATIONS 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

BE & K Construction Co. v. United Broth. of Carpenters and Joiners of America, AFL-CIO, 90 F.3d 1318 (8th Cir. 1996) 9

Bradford v. Norfolk Southern Corp., 54 F.3d 1412 (8th Cir. 1995) 15

Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998) 9

Cross v. General Motors Corp., 721 F.2d 1152 (8th Cir. 1983) 18

Day v. Johnson, 119 F.3d 650 (8th Cir. 1997) 14

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 6

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 9

Griffith v. Edwards, 493 F.2d 495 (8th Cir. 1974) 22

Haire v. Calloway, 572 F.2d 632 (8th Cir. 1978) 6

Harris v. Lincoln County Residential Facilities, 116 F.3d 480 (8th Cir. 1997) 20

Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978) 7

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 14

In re: City of Philadelphia Litigation, 158 F.3d 723 (3rd Cir. 1998) 20

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Certified Grocers, 1990 WL 36792 (N.D. Ill. 1990) 13

Johnson v. Baptist Medical Center, 97 F.3d 1070 (8th Cir. 1996) 15

Jones v. Frank, 718 F.Supp. 931 (S.D. Fla. 1989) ...11, 12

Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329 (3rd Cir. 1985)..... 20

McCullough v. Real Foods, Inc., 140 F.3d 1123 (8th Cir. 1998) 15

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 6, 14

Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982) 6

Nachtigall v. Class, 48 F.3d 1076 (8th Cir. 1995) 18

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984)..... 13

Pledger v. Troll Book Clubs, 392 S.W.2d 389 (Ark. 1994)..... 9

Rayes v. Johnson, 969 F.2d 700 (8th Cir. 1992) 17

Rivers-Frison v. Southeast Missouri Community Treatment Ctr., 133 F.3d 616 (8th Cir. 1998) 16

Scharnhorst v. Indep. Sch. Dist. No. 710, 686 F.2d 637 (8th Cir. 1982)..... 20

Spear v. Dayton's, 771 F.2d 1140 (8th Cir. 1985) 20

Tate v. Weyerhaeuser Co., 723 F.2d 598 (8th Cir. 1983), *cert. denied*, 469 U.S. 847 (1984)..... 6

TABLE OF AUTHORITIES – Continued

Page

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 6, 14

Weaver v. Pung, 925 F.2d 1097 (8th Cir. 1991) 18

Wolff v. Berkley, Inc., 938 F.2d 100 (8th Cir. 1991) 7

Worthy v. U.S. Steel Corp., 616 F.2d 698 (3rd Cir. 1980) 7

Wynn v. North American Systems, Inc., 608 F.Supp. 30 (N.D. Ohio 1984) 12

STATUTES AND RULES:

9 U.S.C. § 10 12

28 U.S.C. § 1915(d) 17

42 U.S.C. § 2000e-2(a) 8

42 U.S.C. § 2000e(b) 8

Fed. R. Civ. P. 38(a) 21

Fed. R. Civ. P. 38(b) 19

Fed. R. Civ. P. 38(d) 20

Sup. Ct. R. 15 22

SECONDARY SOURCES:

BLACK'S LAW DICTIONARY 105 (6th ed. 1990) 10

CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES, PART I, § A(1), 64 LA 1317, 1320 (1975) 10

TABLE OF AUTHORITIES – Continued

Page

RESTATEMENT (SECOND) OF AGENCY § 1 (1958) 9

RESTATEMENT (SECOND) OF AGENCY § 14..... 9

COUNTER-STATEMENT OF THE CASE

The relevant facts of this case are few. Vishnue Jennings ("Petitioner") is an African-American woman who has been an employee of Kellogg Company ("Kellogg" or "Respondent" or "Defendant Kellogg") for over 20 years. At all times material to the Motions for Summary Judgment filed by Kellogg and Local 50 of the American Federation of Grain Millers ("Union" or "Respondent Union" or "Defendant Union"), the Petitioner was employed by Kellogg at its Omaha facility. The Petitioner was also a member of the Union. Appendix 1, App. 6. The Petitioner's relationship with Kellogg was primarily governed by two documents. First, Kellogg and the Union were parties to a master collective bargaining agreement, along with a supplemental collective bargaining agreement, regarding the Omaha facility. These agreements contained grievance procedures and provided for binding arbitration of unresolved grievances. Appendix 1, App. 6. Second, Kellogg maintained an internal set of Work Rules independent of its relationship with the Union. These rules set forth the types of behavior that could result in discipline up to, and including, discharge. Pertinent to this matter, those rules stated that deliberate destruction of Kellogg property was prohibited and deemed a Group I violation. Group I violations were punishable by any appropriate measure, including discharge. Appendix 1, App. 6.

On September 29, 1996, Kellogg's operations were disrupted by a series of suspicious "accidents" on its production lines at the Omaha facility. Kellogg eventually received nine reports indicating that sabotage had caused those "accidents." Kellogg launched investigations into

each reported incident, and uncovered evidence implicating three employees: the Petitioner, Don Jackson, and Margaret Welch. It is critical to note that the Petitioner is a black female, Don Jackson is a white male, and Margaret Welch is a white female. Appendix 1, App. 7.

Each of those employees were given an opportunity to respond to the charges, and the results of Kellogg's investigation, at separate hearings. On October 15, 1996 – after a hearing in which the Petitioner was unable to refute evidence that she had sabotaged Kellogg's production lines – the Petitioner was terminated for violating Kellogg's Work Rules. Appendix 1, App. 7. Don Jackson and Margaret Welch were both terminated along with the Plaintiff, and for the exact same reason – violation of Kellogg's Work Rules. Appendix 1, App. 7. Like the Petitioner, Don Jackson and Margaret Welch were each afforded a hearing prior to their termination.

The Union filed grievances on behalf of all three of the discharged employees on October 15, 1996. All three grievances were denied by Kellogg on October 21, 1996. Thereafter, the Union took each of the grievances to arbitration. Appendix 1, App. 7.

Each grievance was decided by a different arbitrator, with predictable results. Don Jackson's grievance was found to have merit by Arbitrator Richard V. Penfield, who, on November 12, 1997, ordered that Kellogg reinstate Jackson, with back pay. Margaret Welch's grievance was denied by Arbitrator John R. Thornell on November 14, 1997, and her termination was upheld. The Petitioner's grievance was affirmed in part, and denied in part, by Arbitrator Father Frank J. Murphy, S.J., who, on

November 29, 1997, ordered that Petitioner be reinstated by Kellogg, without back pay. Upon her reinstatement, the Petitioner filed a grievance protesting Arbitrator Murphy's denial of back pay, which was denied by Kellogg. That grievance was not appealed.

It was Kellogg's refusal to pay the Petitioner back pay – a remedy not ordered by the Arbitrator – that prompted her to file race and sex discrimination charges against Kellogg with the Nebraska Equal Opportunity Commission ("NEOC") on January 23, 1997. Appendix 1, App. 7.

Following its investigation, on December 11, 1997, the NEOC found that no probable cause existed to support Petitioner's race discrimination claim. In its decision, the NEOC stated: "Two white employees [Don Jackson and Margaret Welch], similarly charged with sabotage were terminated . . . " Appendix 1, App. 7. In that same decision, the NEOC also found that no probable cause existed to support Petitioner's sex discrimination claim, holding: "A male employee [Don Jackson], similarly charged with sabotage, was treated in the same was [*sic*] that the [Petitioner] was treated, he was also terminated." Appendix 1, App. 7.

Following her receipt of the NEOC's decision, the Petitioner filed her Complaint with the United States District Court for the Western District of Tennessee. That court granted Jennings's Motion to Transfer Venue to the United States District Court for the District of Nebraska. Appendix 1, App. 8.

As part of the Petitioner's initial filings, she moved for permission to proceed *in forma pauperis*, contending

that she was impoverished and unable to otherwise proceed with her claim. That Motion was granted by the district court based on the Petitioner's representations.

After the change of venue, Defendant Kellogg moved to have this matter dismissed when it learned that the Petitioner had materially misrepresented her financial status in her Motion to proceed *in forma pauperis*. Specifically, although the Petitioner had pled she was a pauper, in 1998 she earned $71,998.78, and by November 6, 1999, she had earned $65,489.16 for that calender year. The Petitioner was unable to refute the evidence showing a decided lack of poverty, and, on December 10, 1999, the Nebraska district court determined that the Petitioner could not proceed in this matter *in forma pauperis*. Appendix 2, App. 22. The Court further placed Defendant Kellogg's Motion to Dismiss under advisement until the Petitioner paid her filing fee.

In the interim, on November 11, 1999, Kellogg filed its Motion for Summary Judgment which is the subject of this appeal. The Union filed its Motion for Summary Judgment on November 30, 1999. In response, on December 30, 1999, the Petitioner filed her own Motion for Summary Judgment. On May 18, 2000, both Kellogg's and the Union's Motions for Summary Judgment were granted, while the Plaintiff's Motion for Summary Judgment was denied. Appendix 1, App. 20-21. The United States Court of Appeals for the Eighth Circuit entered an unpublished decision affirming the trial court's granting of the Respondents' Motions for Summary Judgment. *Jennings v. Kellogg USA, Inc. and American Federation of*

Grain Millers Local #50, No. 00-2779 (8th Cir. 2001). Appendix 3, App. 24-25.

ARGUMENT

A. The Trial Court Properly Granted Respondent Kellogg's Motion for Summary Judgment.

Even when viewed in a light most favorable to her, the Petitioner could not establish that Kellogg violated Title VII on the facts of this case. The trial court, therefore, properly dismissed the matter pursuant to the Defendants' Motions for Summary Judgment. Moreover, even in her Petition for Writ of Certiorari, the Petitioner has not offered any *legal* arguments explaining why the trial court's granting of summary judgment for Kellogg was improper. Rather, she has offered a series of unsubstantiated misrepresentations to the Court in the hopes that she can prolong her legal assault on Kellogg a few more months.

The United States Supreme Court first established the analytical framework applicable to Petitioner's discrimination claim in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a plaintiff carries the initial burden of establishing a *prima facie* case. Only if such a *prima facie* case is established will the burden of proof shift to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. If the employer meets this burden of proof, the burden of proof reverts to the plaintiff and merges with her ultimate burden of persuasion to demonstrate that the employer's justification was a mere pretext for race

and/or sex discrimination. *McDonnell Douglas*, 411 U.S. at 802-803. *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

A *prima facie* case of discrimination is established by a showing that the plaintiff:

(1) was a member of a protected class;

(2) was discharged or some other negative employment decision was made;

(3) was qualified for her position; and

(4) persons not a member of her protected group were treated differently.

Haire v. Calloway, 572 F.2d 632, 17 FEP 252 (8th Cir. 1978); *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982).

Put simply, a *prima facie* case is established when a plaintiff demonstrates "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978) (internal citations omitted).

1. Petitioner's *Prima Facie* Case

The burden was on the Petitioner to establish a *prima facie* case of race and/or sex discrimination – to show that she was treated differently (i.e., less favorably) than similarly-situated white and/or male employees. *Tate v. Weyerhaeuser Co.*, 723 F.2d 598 (8th Cir. 1983), *cert. denied*, 469 U.S. 847 (1984). If the Petitioner had made such a showing, Kellogg would have been required to come

forth with an explanation for any seeming disparity in treatment. *Wolff v. Berkley, Inc.*, 938 F.2d 100 (8th Cir. 1991); *Worthy v. U.S. Steel Corp.*, 616 F.2d 698 (3rd Cir. 1980); *Higgins v. Gates Rubber Co.*, 578 F.2d 281 (10th Cir. 1978).

Kellogg concedes that the Petitioner is a black female, and is, therefore, part of a protected class. Kellogg also admitted in its Motion for Summary Judgment that the Petitioner was otherwise "qualified" for her position. It is important to note, however, that the Petitioner offered two separate theories of recovery in her Title VII suit. The Petitioner alleged that she had been subjected to two negative employment decisions: (1) her discharge by Kellogg; and (2) her subsequent reinstatement without back pay through labor arbitration.

a. Petitioner's Discharge

Kellogg terminated the Petitioner. Therefore, the Petitioner was a member of a protected class who was terminated from a position that she was qualified to hold. Given this premise, under the above-referenced framework, the Petitioner needed only to show that employees outside of her class were treated better than her. In other words, she needed to show that similarly-situated white and/or male employees were not treated similarly.

However, the Petitioner was unable to establish this element. In fact, a white male and a white female were both terminated for the same reasons as the Petitioner. Appendix 1, App. 10. Consequently, the trial court properly reached the same conclusion:

> I agree [with Kellogg] that Jennings cannot establish that she was treated differently when she was terminated. Kellogg accused two other employees besides Jennings of sabotage. Kellogg terminated all three employees at the same time. Both of the other employees were white; one was male. Yet only the white male and Jennings were reinstated following arbitration; the white female's termination was upheld. Jennings thus cannot demonstrate any racially disparate treatment in the termination process.

Appendix 1, App. 10.

b. The Petitioner's Reinstatement Without Back Pay

The Petitioner further alleged that she was discriminated against through the decision of the arbitrator when she was reinstated without back pay. Appendix 1, App. 10. However, as explained in detail below, an arbitrator's decision is not an adverse employment action. Kellogg, therefore, could not be held liable for adhering to an arbitrator's decision.

Title VII provides, in part, "[t]hat it shall be an unlawful employment practice to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII defines "employer" as "a person . . . who has fifteen or more employees . . . and any **agent** of such a person." 42 U.S.C. § 2000e(b) (emphasis added). At best, the Petitioner's

Complaint could be construed as alleging that the arbitrator who heard Plaintiff's grievance, Father Frank J. Murphy, S.J., was an agent of Kellogg.

This Court has recognized that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2265-66 (1998). The Supreme Court indicated that the RESTATEMENT (SECOND) OF AGENCY ("RESTATEMENT") "is a useful beginning point for a discussion of general agency principles." *Id.* at 2266. The RESTATEMENT explains the nature of agency as follows:

> Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

The Eighth Circuit has clarified the RESTATEMENT'S definition by noting that "[a]n essential element of any agency claim is that the asserted principle has the **right to control** the actions of the asserted agent." *BE & K Construction Co. v. United Broth. of Carpenters and Joiners of America, AFL-CIO*, 90 F.3d 1318, 1326 (8th Cir. 1996) (*citing General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (emphasis added)); *Pledger v. Troll Book Clubs*, 392 S.W.2d 389, 392 (Ark. 1994); RESTATEMENT (SECOND) OF AGENCY § 14.

BLACK'S LAW DICTIONARY defines an arbitrator as "[a] **neutral** person either chosen by the parties to a dispute or appointed by a court, to hear the parties'

claims and render a decision." BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (emphasis added). This definition was a perfect match to Arbitrator Murphy's authority, as the impartiality of the arbitrator is fundamental to the parties' grievance and arbitration procedures. No employer or labor union would ever agree to have their differences settled by an individual controlled by the other. Such a system would also undercut the first priority of our nation's labor policy – maintaining industrial peace.

Further, the Arbitrators' Code of Professional Responsibility requires independence as one of an arbitrator's "General Qualifications":

> Essential personal qualifications of an arbitrator include honesty, integrity, **impartiality** and general competence in labor matters. An arbitrator must demonstrate the ability to exercise these personal qualifications faithfully and with good. . . .

CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES, PART I, § A(1), 64 LA 1317, 1320 (1975) (emphasis added).

The Petitioner offered no evidence establishing that Arbitrator Murphy was under the control and direction of Kellogg. In fact, if Kellogg had control over the actions of Arbitrator Murphy, the Petitioner would not have been reinstated at all. Without the requisite agency relationship, Kellogg could not be held liable to the Petitioner for the Arbitrator's decision. Therefore, the Petitioner could not make out a *prima facie* case of discrimination based on the discrimination of Kellogg "through" Arbitrator Murphy's decision.

The trial court also agreed with Kellogg on this point as well, holding:

> I also agree [with Kellogg] that as a matter of law, Jennings cannot establish that Kellogg discriminated against her with regard to the arbitrator's reinstatement award. Fr. Murphy was a neutral, impartial arbitrator whom the AFGM and Kellogg jointly chose to resolve the parties' claims. Jennings has offered no evidence that Fr. Murphy had either hidden allegiances to Kellogg or any vested interest in the outcome of the arbitration, or that he in any manner violated the Arbitrator's Code of Professional Responsibility. As Kellogg points out, Murphy could hardly have been an agent under Kellogg's control, given his decision to reinstate Jennings after Kellogg terminated her.

Appendix 1, App. 10.

Even if the trial court found that Arbitrator Murphy's decision was an "adverse employment decision," Kellogg's adherence to this decision did not violate Title VII.

Other courts have granted summary judgment to employers when confronted by nearly identical facts. In *Jones v. Frank*, 718 F.Supp. 931 (S.D. Fla. 1989), two Postal Service employees, one white and one black, were involved in a fight at work. As a result of the fight, both employees were terminated. *Id.* Both employees filed grievances, and each case was heard by a separate arbitrator. One arbitrator reduced the white employee's termination to a 60-day suspension, and he was subsequently reinstated by the Postal Service. *Id.* at 932. A second arbitrator denied the black employee's grievance, and upheld his termination. *Id.*

The black employee filed a Title VII lawsuit against the Postal Service for implementing the arbitrators' decisions. The court granted summary judgment in favor of the Postal Service, finding that "[t]he record, even when viewed in a light most favorable to the Plaintiff, indicates that Defendant treated him the same as [the white employee]; both were fired. If Plaintiff's claim is that the arbitrator acted in a discriminatory manner by not reinstating him, his cause of action lies against the arbitrator, if anyone." *Id.* at 933-934. *See also, Wynn v. North American Systems, Inc.*, 608 F.Supp. 30, 33 (N.D. Ohio 1984) (holding that black employee, who had been discharged along with white employee for fighting at work, failed to prove *prima facie* case of employment discrimination against employer for implementing arbitrator's decision reinstating white employee but denying reinstatement to black employee – the court recognized that the "[white employee] and [black employee] were both discharged for fighting, without favoritism toward either employee").

As recognized in both *Jones* and *Wynn*, the Petitioner's recourse here, if any, was against Father Murphy – not Kellogg. If the Petitioner truly thought that Arbitrator Murphy's decision was biased or racially discriminatory, she could have filed an action to vacate his award pursuant to 9 U.S.C. § 10. She did not. The trial court noted that if the Petitioner believed Father Murphy discriminated against her, then "her legal recourse would have been to appeal the arbitration, not to sue Kellogg for discrimination when it implemented Fr. Murphy's decision." Appendix 1, App. 11. Consequently, the Petitioner

was unable to establish a *prima facie* case of discrimination and the trial court properly granted Kellogg's Motion for Summary Judgment.

2. Kellogg's Legitimate, Nondiscriminatory Reason for Terminating Petitioner

Assuming *arguendo* that the Petitioner had been able to establish a *prima facie* case of disparate treatment, Kellogg unquestionably proffered a legitimate, nondiscriminatory reason for terminating her employment. It has repeatedly been recognized that the destruction of company property, even if **unintentional**, provides a legitimate, nondiscriminatory reason for dismissal. *Jackson v. Certified Grocers*, 1990 WL 36792, 56 Fair Empl. Prac. Cas. (BNA) 1638 (N.D. Ill. 1990). This rationale clearly applies in this case, as Kellogg is in the consumer food products business and, by necessity, maintains a zero-tolerance policy towards the deliberate destruction of company property, acts which could impact the safety of millions of consumers.

As a result, whether terminating the Petitioner's employment for involvement in only one act of sabotage – based upon the testimony of one witness and the credibility determination of its Human Resources Director – is "fair" or too severe simply has no bearing on the issue of illegal employment discrimination. *See, Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (noting that "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason"). In the words

of the trial court, "Kellogg was entitled to enforce its policy." Appendix 1, App. 12.

As the Eighth Circuit has repeatedly held, "[T]he employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). *See also, Day v. Johnson*, 119 F.3d 650, 657 (8th Cir. 1997) (holding that "federal courts are not self-appointed personnel managers, and they may not second guess the fairness or wisdom of an employer's nondiscriminatory employment decisions").

3. The Reason Given for the Petitioner's Termination Was Not Pretextual

As noted above, once an employer meets its burden of proof by showing that it had a legitimate, nondiscriminatory reason for taking action against a plaintiff, the burden of proof reverts to the plaintiff and merges with her ultimate burden of persuasion to demonstrate that the employer's justification was a mere pretext for race and/or sex discrimination. *McDonnell Douglas*, 411 U.S. at 802-803. *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In the instant case, the Petitioner claimed discrimination based on both race and gender. Yet, she does not dispute that a white male employee was terminated for the same reasons as the Petitioner. In addition, the Petitioner also completely misstates that a similarly-situated

white female was never discharged. As addressed above, Ms. Welch was similarly terminated by Kellogg for precisely the same reason as the Petitioner. These facts thoroughly undercut any notion of pretext.

Kellogg asserts that the Petitioner can produce no evidence which suggests that Kellogg's actions were a pretext for race and/or gender discrimination. Kellogg correctly anticipated that the Petitioner would attempt to rely on statements, actions, or rumors of which she had no first-hand knowledge. Similar attempts have proven ill-fated. The United States Court of Appeals for the Eighth Circuit has consistently held that where "proof" of disparate treatment "consists entirely of hearsay", it "cannot defeat a motion for summary judgment." *Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1073 (8th Cir. 1996). All the Petitioner has ever offered in this case is her subjective personal opinion as to why she believes her termination resulted from race or gender discrimination. Personal opinion, without more, simply cannot support a finding of pretext in an employment discrimination case. *Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412, 1421 (8th Cir. 1995).

Moreover, even if the Petitioner had produced circumstantial evidence of pretext, her claim still would have lacked "plausibility when the evidence is considered as a whole." *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1128 (8th Cir. 1998). "Of course, evidence that the [employer's] proffered reasons for termination were pretextual will only defeat summary judgment if the evidence could persuade a reasonable fact-finder that [the employee] was discharged because of intentional race [or

gender] discrimination." *Rivers-Frison v. Southeast Missouri Community Treatment Ctr.*, 133 F.3d 616, 621 (8th Cir. 1998).

Not only is the record devoid of evidence which could establish pretext in this case, myriad factors cut against any suggestion of intentional discrimination – such as the extensive and identical due process considerations afforded to the Petitioner, Mr. Jackson, and Ms. Welch pursuant to both Kellogg Work Rules and the parties' collective bargaining agreements. Nothing in these facts suggests an employer who has intentionally discriminated against Petitioner because of her race and/or sex. As a result, the Petitioner's disparate treatment claim failed as a matter of law.

The state of the Petitioner's claim was perhaps best described by the trial court in its summation of the matter:

> Jennings does not dispute the basic facts Kellogg has put forth. Kellogg accused three employees of sabotage. One was a white male, one was a white female, and one was Jennings – a black female. All three were investigated; all three received suspension hearings; all three were terminated; all three grieved their discharge through arbitration. The white man and the black woman were reinstated following arbitration; the white woman was not. Despite Jennings's passionate but unsubstantiated arguments to the contrary in her many submissions, the racial and gender mix of the terminated employees precludes a finding that

> Jennings's termination was a pretext for intentional discrimination. The evidence also precludes any inference that Jennings's race and gender were determinative factors in Kellogg's decision to terminate her for her role in the alleged sabotage. Consequently, Jennings has not demonstrated the existence of specific facts that create a genuine issue on pretext. She has failed to establish as a matter of law that she was a victim of disparate treatment at the hands of her employer.

Appendix 1, App. 12-13.

B. The Trial Court Properly Refused to Appoint an Attorney to Represent the Petitioner.

The Petitioner also contends that the district court erred in not ruling on her request for a court-appointed attorney to help her pursue her civil claim. P7. Petition for Writ of Certiorari. The result of the court's error, according to the Petitioner, is that she was denied her court-appointed counsel, due process of law and equal protection. *Id.* In other words, the Petitioner appears to contend that the outcome of this case may have been different if the trial court had ruled on her request for a court-appointed attorney.

Indigent civil litigants do not have a constitutional or statutory right to appointed counsel. *Rayes v. Johnson*, 969 F.2d 700, 702 (8th Cir.), *cert. denied*, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992). Once indigent pro se litigants meet their burden of showing that their complaints are not frivolous pursuant to 28 U.S.C. § 1915(d),

counsel should be appointed if the district court determines it is necessary. *Nachtigall v. Class*, 48 F.3d 1076, 1081 (8th Cir. 1995). The standard for determining the necessity of appointed counsel is whether both the indigent litigant and the court would benefit from the assistance of counsel. *Id.* "Factors bearing on this determination include: the factual complexity of the issues; the ability of an indigent to investigate the facts; the existence of conflicting testimony; the ability of an indigent to present his claim; and the complexity of the legal issues." *Id.*

Of course, the analysis above only matters if the pro se litigant is, in fact, indigent, or proceeding *in forma pauperis*. The decision to grant or deny *in forma pauperis* status is within the sound discretion of the trial court. *Cross v. General Motors Corp.*, 721 F.2d 1152, 1157 (8th Cir. 1983). For example, the United States Court of Appeals for the Eighth Circuit has upheld trial court decisions denying applications to proceed *in forma pauperis* on the grounds that the pro se litigant earned too much income. *Weaver v. Pung*, 925 F.2d 1097 (8th Cir. 1991). In that case, the plaintiff's income during the twelve months preceding the action was estimated at $26,000 to $30,000. The filing fee was $5.00.

In the instant matter, the civil litigant requesting a court-appointed attorney was not indigent. The Petitioner earned $71,998.78 in gross wages in 1998, and $65,489.16 in 1999, as of November 6. The trial court correctly determined that Plaintiff could not proceed with this matter *in forma pauperis* as of December 10, 1999. Appendix 2, App. 22-23. Despite this finding, the Petitioner represents only that she was "granted forma paupers status" by the trial court. P7. Petition for Writ of Certiorari. Because she

could not proceed *in forma pauperis*, she was not eligible to receive the aid of a court-appointed attorney.

C. The Trial Court Properly Denied the Petitioner's Demand For Jury Trial.

The Petitioner contends that she "demanded a jury trial that was denied." P7. Petition for Writ of Certiorari. However, the Petitioner makes no mention of when that demand was made, or what rules would govern the trial court's handling of such a demand. Federal Rule of Civil Procedure 38(b) states that "[a]ny party may demand a trial by jury of any issue triable of *right* by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and *not later than 10 days* after the service of the last *pleading* directed to such issue, and (2) filing the demand as required by Rule 5(d)." Fed. R. Civ. P. 38(b) (emphasis added).

The Petitioner's Complaint was filed June 3, 1998, in the United States District Court for the Western District of Tennessee. Appendix 1, App. 8. No jury demand was included in the Petitioner's Complaint. The last pleading filed in this matter "directed to such issue" was Defendant Kellogg's Answer and Affirmative Defenses, filed with the court on September 1, 1998. The Petitioner demanded a jury trial on July 19, 1999. This demand was made some 10 months after Kellogg filed its Answer and Affirmative Defenses. The Petitioner's delay in demanding a jury trial prompted both Kellogg and the Union to move to have the Plaintiff's demand struck.

United States Magistrate Thomas Thalken struck the Petitioner's jury demand and denied a jury trial because the demand was more than 10 days after the service of the last pleading directed to such issue, namely, the Defendants' Answers. Appendix 4, App. 45-49. In so striking her demand, the Magistrate found that the Petitioner had waived her right to a jury trial under Fed. R. Civ. P. 38(d). Appendix 4, App. 47.

The Petitioner thereafter filed a Motion to Reconsider the Order Denying Demand for Jury Trial. Magistrate Thalken overruled the Petitioner's Motion to Reconsider because: (1) The Motion was not accompanied by any new evidence or evidence that was not previously available. Appendix 5, App. 67-75. *See, Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3rd Cir. 1985); (2) A constitutional right to a jury can be waived by inaction. *In re: City of Philadelphia Litigation*, 158 F.3d 723 (3rd Cir. 1998); and (3) The Plaintiff's request was out of time under Fed. R. Civ. P. 38(d). Appendix 5, App. 67-75.

The Petitioner's failure to timely demand a jury trial constituted a waiver of her right to a jury trial – if such a right existed at all. *Harris v. Lincoln County Residential Facilities*, 116 F.3d 480 (8th Cir. 1997). *See, Spear v. Dayton's*, 771 F.2d 1140, 1144 (8th Cir. 1985) (stating that pro se litigants are not afforded any special leniency under Rule 38 and that a district court's refusal to excuse waiver is reviewed for abuse of discretion); *Scharnhorst v. Indep. Sch. Dist. No. 710*, 686 F.2d 637, 641 (8th Cir. 1982) (holding that appellant waived right to jury trial by failing to make timely demand, regardless of proffered explanation). The trial court did not abuse its discretion in denying the Petitioner's Demand for Jury Trial. Moreover, the

dismissal of this case at the summary judgment stage renders the Petitioner's argument in regard to the denial of a jury trial moot.

D. The Trial Court's Dismissal of Petitioner's Title VII Suit Did Not Violate Petitioner's Due Process or Equal Protection Rights.

The Petitioner seems to argue, generally, that she has been denied due process and equal protection. In this regard, she "prays this honorable court will grant the writ of certiorari and secure to Petitioner her due process of law and equal protection of the laws." P8. Petition for Writ of Certiorari. In fact, one of the questions presented by the Petitioner is whether "the court erred in denying a demanded jury trial under The Constitution of The United States of America, Bill of Rights, VII Amendment and Fed. R. Civ. P. Rule 38(a), where there are disputed facts that violate Petitioner's due process of law and equal protection of the law." Pi. Petition for Writ of Certiorari.

Although it is difficult to interpret exactly what the Petitioner is arguing in this portion of her appeal, it appears as though she is intimating that the United States District Court for the District of Nebraska somehow discriminated against her or otherwise treated her improperly by, through its handling of the case, denying her basic civil rights guaranteed under the Constitution. This interpretation of the Petitioner's due process and equal protection argument stems from her statement that the "trial court erred in granting Respondent's motion for summary judgment, without a hearing, and numerous

issues of material disputed facts and the denial of Petitioner's rights, the appellate court erred in upholding the decision of the trial court." P6. Petition for Writ of Certiorari.

The Petitioner offers no evidence that even suggests that the district court acted with bias. In any event, it would take more than the Petitioner's unsubstantiated comments regarding the district court in order to create a question regarding whether the trial court was biased. *See, Griffith v. Edwards,* 493 F.2d 495 (8th Cir. 1974). The district court did not violate the Plaintiff's due process or equal protection rights.

E. Petitioner's Writ of Certiorari is Premised On Multiple Material Misrepresentations.

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Kellogg has an obligation "to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the Petition." *Id.* Consequently, the remainder of Kellogg's Brief in Opposition is aimed at pointing out the Petitioner's multiple, material misrepresentations to the Court.

First, the Petitioner states that she "was singled out as an African-American female and discharged while similarly situated white males and females were treated more favorably." P3. Petition for Writ of Certiorari. Later in her Petition, however, the story changes somewhat. The Petitioner notes that a "white male in a similar situation and not a member of a protected class, *was also fired, but he was reinstated with back pay, benefits and seniority restored.*" (Emphasis supplied). P5. Petition for Writ of

Certiorari. In an attempt to further distinguish her experience from the "white male," the Petitioner, referring to herself in the third person, writes that she "was not reinstated until some 14 months later, no back pay was restored to her. Her seniority was soon thereafter purged in retaliation against her." P5. Petition for Writ of Certiorari. The Petitioner fails to address that both the white male, Don Jackson, and the Plaintiff were reinstated through different arbitrators. In fact, the arbitrator for Mr. Jackson specifically ordered reinstatement with back pay, and the arbitrator addressing the Petitioner's grievance ordered Petitioner reinstated without requiring this remedy.

Referring back to the "white female" who was allegedly treated more favorably, the Petitioner notes that she was "never discharged, nor even reprimanded, for allegedly lying to company managers who stated that Petitioner was discharged because the white female had told them she saw Petitioner commit sabotage." P5. Petition for Writ of Certiorari. In fact, in a last reference to the "white female", who the Petitioner contends was similarly situated with her but treated more favorably, the Petitioner notes:

> Petitioner Jennings was a member of a protected class under an act of congress Title VII, she was discriminated against and fired for 14 months reinstated without back pay, while her counterpart in the similar situation, a white male, was fired, rehired and all back pay, benefits and seniority reinstated. *The white female was not fired at all.* (Emphasis supplied).

P7. Petition for Writ of Certiorari.

However, this statement is inaccurate. Margaret Welch, a white female, was also accused of sabotage and was also terminated by Kellogg. Appendix 1, App. 12-13. The Petitioner's failure to acknowledge that Ms. Welch was terminated is easily explained. Ms. Welch was not only terminated for engaging in the same activity of which the Plaintiff was guilty, she was not reinstated to her employment. Consequently, the Plaintiff could not point to a single saboteur – regardless of race or sex – who wasn't discharged. Since the Petitioner could not identify a "similarly-situated" employee that was treated differently, her discrimination claim had to fail as a matter of law.

In addition, there exists numerous additional misrepresentations throughout Petitioner's Writ of Certiorari. Specifically, Petitioner's rambling inaccurate references to a diversity film, allegations of pervasive harassment, and blanket statements that the Petitioner was singled out based on race and/or sex in her discharge and subsequent reinstatement are all unsupported by the record. P3-5. Petition for Writ of Certiorari. Consequently, the Petitioner is attempting to inaccurately rephrase the issues and facts supported by the evidence, and properly addressed by the preceding courts, in a final attempt to raise issues of material fact. However, in light of Petitioner's numerous material misrepresentations throughout the Petitioner's Writ of Certiorari, it becomes evident that the United States Court of Appeals for the Eighth Circuit properly affirmed the trial court's decision granting summary judgment on behalf of Kellogg and denying

Petitioner's request for a court-appointed attorney and jury trial.

CONCLUSION

The Petitioner's Petition for Writ of Certiorari is without merit. The facts underlying this case created no genuine issue of material fact for the district court to resolve. As such, it is clear that Kellogg did not discriminate against the Petitioner in any manner. The trial court properly granted the Defendants' Motions for Summary Judgment and the Petitioner's Petition should, therefore, be denied.

Respectfully submitted,

MARK E. MCQUEEN
BERENS & TATE, P.C.
10050 Regency Cir., Suite 400
Omaha, Nebraska 68114
(402) 391-1991
Counsel of Record for Respondent, Kellogg Company

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

VISHNUE I. JENNINGS, Plaintiff, vs. KELLOGG USA, INC., and AMERICAN FEDERATION OF GRAIN MILLERS LOCAL NO. 50, Defendants.	)	8:98CV423 **MEMORANDUM AND ORDER** (Filed May 18, 2000)

I. Introduction

Before me is a welter of motions and other submissions in this pro se action brought by the plaintiff, Vishnue I. Jennings (Jennings), against her employer, Kellogg USA, Inc. (Kellogg), and her former union, American Federation of Grain Millers Local No. 50 (AFGM). The plaintiff first filed her action in the United States District Court for the Western District of Tennessee in June 1998, alleging that the defendants discriminated against her on the basis of her race, color, and sex in violation of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (as amended). The plaintiff moved to transfer venue, and the action was transferred to this court in August 1998.

All parties now seek summary judgment. In addition, the parties have filed numerous motions related to their motions for summary judgment. The outstanding motions include:

1. Kellogg's motion (Filing No. 130) for summary judgment (Index of Evidence in Support of Motion, Filing No. 131);

2. AFGM's motion (Filing No. 136) for summary judgment (Index of Evidence in Support of Motion, Filing No. 137; Supplementary Indexes of Evidence, Filing Nos. 164, 176);

3. Jenning's motion (Filing No. 199) for summary judgment, entitled "Plaintiff's Memorandum in Support of Petition for Summary Judgment";

4. AFGM's motion (Filing No. 154) to strike portions of plaintiff's affidavit;

5. Kellogg's motion (Filing No. 159) to strike itemization of undisputed material facts;

6. Kellogg's motion (Filing No. 161) to strike affidavit in support of plaintiff's response and objection to defendant's motion for summary judgment;

7. Kellogg's motion (Filing No. 162) to strike plaintiff's disputed material facts and issues;

8. Kellogg's motion (Filing No. 163) to strike the affidavit of Vishnue I. Jennings;

9. AFGM's motion (Filing No. 166) to strike affidavits and statement of disputed material facts and issues;

10. Jennings's motion (Filing No. 169) to strike all of defendant's motions and briefs;

11. Jennings's motion (Filing No. 177) to strike defendant's supplement to its motion for summary judgment;

12. AFGM's motion (Filing No. 179) to dismiss for lack of subject matter jurisdiction;

13. Jennings's motion (Filing No. 180) to strike reply brief, supplemental brief, and reply to plaintiff's motion to strike;

14. Jennings's motion (Filing No. 181) to strike defendant's motion for summary judgment;

15. Jennings's motion (Filing No. 185) to strike the defendant's motion to dismiss;

16. AFGM's motion (Filing No. 188) for an order permitting a reply brief;

17. AFGM's motion (Filing No. 190) to dismiss for failure to exhaust administrative remedies;

18. AFGM's motion (Filing No. 190) in limine;

19. Jennings's motion (Filing No. 191) to strike documents filed after defendant's motion for summary judgment;

20. Jennings's motion (Filing No. 192) to strike defendant's motion for summary judgment;

21. AFGM's motion (Filing No. 193) to allow responsive affidavits;

22. Jennings's motion (Filing No. 194) to dismiss defendant's motion in limine;

23. Jennings's motion (Filing No. 195) to strike defendant's exhibits;

24. Kellogg's motion (Filing No. 200) to continue the trial date; and

25. AFGM's motion (Filing No. 205) in limine.

In addition to these motions, Jennings submitted other documents, the titles of which do not conform with

pleading practice in this court, but which clearly relate to the motions for summary judgment or the trial of her claims. Because Jennings appears pro se and is unfamiliar with the requirements of the Federal Rules of Civil Procedure or this court's local rules, the clerk's office has, where possible, given her submissions their proper titles and made them part of the record. In other instances, I have attempted to construe Jennings's submissions in such a way to give them the intended legal effect. Some submissions, however, defied classification; these played no role in my decision here.

I have now reviewed the extensive record, the parties' motions for summary judgment and their voluminous indexes of evidence, the parties' supporting and opposing briefs, the parties' other submissions, and the applicable law, and I conclude that the plaintiff's motion for summary judgment should be denied, Kellogg's motion for summary judgment should be granted, and the AGFM's motion for summary judgment should be granted.

II. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court grants summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When viewing the evidence, all ambiguities and inferences to be drawn from the underlying facts are resolved in favor of the party

opposing the motion, and all doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Since this case is before me on cross-motions for summary judgment, this rule has the end result that I take each side's facts in the light most favorable to that side. The court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but rather to determine whether a genuine issue exists for trial. *Rayes v. Eggars*, 838 F. Supp. 1372, 1377 (D. Neb. 1993) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249).

In the Eighth Circuit, summary judgment is granted sparingly in employment discrimination cases because they frequently rise and fall on inferences to be drawn from circumstantial factors, and, accordingly, the trial courts are careful not to usurp the job of the fact-finders. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Davis v. Fleming Cos.*, 55 F.3d 1369, 1371 (8th Cir. 1995); *Hardin v. Hussmann Corp.*, 45 F.3d 262, 264 (8th Cir. 1995); *Oldham v. West*, 47 F.3d 985, 988 (8th Cir. 1995). Therefore, summary judgment should only be granted in those rare instances "where there is no dispute of fact and where there exists only one conclusion." *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1987); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363, 364 (8th Cir. 1987).

III. Factual Background

Despite the amount of the paper the parties have expended to advance their respective positions, this is not

a factually complex case. Jennings is an African-American woman who has been an employee of Kellogg for over twenty years. During the time of the events underlying the motions for summary judgment, she worked at the Omaha facility and was a member of the AFGM. Kellogg and the AFGM had a master collective bargaining agreement and a supplemental collective bargaining agreement regarding the Omaha facility. The agreements contained grievance procedures and required binding arbitration of unresolved grievances. Filing No. 131, Kellogg's Index of Evidence Supporting Motion for Summary Judgment, Aff. of T. Silsbee, Exs. DD, EE (hereafter, Kellogg's Index).

All employees received a copy of the Kellogg employee handbook setting out Kellogg's policies, facilities, and services. *Id.*, Ex. FF. In a section entitled "Working Together," the handbook sets out three groups of infractions for which employees can be disciplined. Group I infractions are the most serious: "[T]he first violation would probably call for discharge. The employee would be suspended, their time card rung out, and notified later when the hearing would be held." *Id.* at 17. Included among the Group I infractions is "[d]eliberate abuse or destruction of company property, contamination of food, sabotage." *Id.* at 18, ¶ 6.

In many of her submissions, Jennings alleges that during the time she worked at the Omaha facility, tension existed between employees who had been working at the Omaha facility and other employees, such as Jennings, who had transferred into the Omaha facility from the Memphis, Tennessee, facility. She also alleges that racial discrimination was prevalent at the Omaha facility. *See,*

e.g., Filing No. 199, Plaintiff's "Petition for Summary Judgment" at 6-7, ¶¶ 29-31, 36-38.

In September 1996, Kellogg accused Jennings and two other employees, Don Jackson and Margaret Welch, of sabotage during a strike. Following an investigation, Kellogg held a suspension hearing for each employee. Kellogg's Index, Aff. of T. Silsbee, Exs. A-E, M-O, T-Y. Kellogg terminated all three employees on October 15, 1996, for violating the Group I rule prohibiting sabotage quoted above. The AFGM filed a grievance on behalf of each employee the same day, but Kellogg denied the grievances on October 21, 1996. *Id.*, Exs. F-G, P-Q, Z-AA. The grievances then went to arbitration. Jennings was represented [sic] M. H. Weinberg, counsel for the AFGM.

In January 1997, Jennings filed a discrimination charge against Kellogg and the AFGM with the Nebraska Equal Opportunity Commission (NEOC). She alleged that based on her race, color, and sex, Kellogg had subjected her to a "hostile work environment" at the Omaha plant, ignored her seniority, denied her overtime, subjected her to intimidation, suspended and then terminated her, denied her grievances and appeals, and refused her access to her savings and investment monies. *Id.*, Ex. K. In December 1997, the NEOC found no reasonable cause to support the allegations of sex or race discrimination. *Id.*, Ex. L. In March 1998, the federal Equal Opportunity Commission issued a right to sue letter to Jennings. Filing No. 1, Att. 1. Jennings also apparently filed a complaint against the AFGM with the National Labor Relations Board. *Id.*, Att. 2. The Board found that the AFGM had not breached the National Labor Relations Act.

In November 1997, the arbitrators handed down their decisions. Arbitrator Frank J. Murphy, S.J., affirmed Jennings's grievance in part and denied it in part, and ordered Kellogg to reinstate her but without back pay. Based in large measure upon the testimony of a white female Kellogg employee, the arbitrator found that Jennings "approved the sabotage although it was not shown that she actually engaged in it." *Id.*, Ex. I at 14. Arbitrator Richard V. Penfield affirmed the grievance of Don Jackson, who is white, ordering Kellogg to reinstate him with back pay. Arbitrator John R. Thornell denied the grievance of Margaret Welch, who is white. *Id.*, Exs. S, CC. Jennings did not appeal the arbitrator's award.

Kellogg reinstated Jennings, but in December 1997 she filed a grievance requesting reimbursement of her union dues and an award of over $88,000 in back pay. *Id.*, Ex. J. In the grievance, she also resigned her membership in the AFGM, claiming that the union had failed to defend her adequately against the sabotage charge and during the arbitration. Kellogg denied the grievance. Jennings did not appeal this denial or seek arbitration.

In June 1998, Jennings filed this pro se action in the United States District Court for the Western District of Tennessee. That court granted Jennings's motion to transfer venue to this district in August 1998. Jennings's complaint alleges that based on her race, color, and sex, 1) Kellogg terminated her employment for alleged sabotage, and 2) the AFGM breached its duty to provide her with fair representation during the suspension and arbitration process. Filing No. 1, Complaint at 3-4. Jennings seeks back pay (including five weeks of vacation pay) for the time from her suspension until her reinstatement.

IV. Discussion

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment. Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Where the plaintiff offers circumstantial evidence to prove discrimination, the sequence and allocation of proof are governed by the Supreme Court decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973). If the plaintiff succeeds in initially establishing a prima facie case of discrimination which the employer cannot explain, a presumption arises that the employer unlawfully discriminated against the plaintiff. The burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. If the defendant is successful, then the presumption raised by the prima facie case is rebutted. The burden shifts back to the plaintiff to show that the employer's proffered reason was merely a pretext for discrimination.

Here, Kellogg first argues that because Jennings cannot establish that Kellogg violated Title VII, her claim must be dismissed as a matter of law. To establish a prima facie case of employment discrimination, a plaintiff must show that 1) the plaintiff is a member of a protected class; 2) the plaintiff was qualified for the job the plaintiff was

performing; 3) the plaintiff suffered an adverse employment action; and 4) a nonmember of the protected class was not subjected to the same adverse employment action. *Thomas v. St. Luke's Health Systems, Inc.*, 869 F. Supp. 1413, 1434 (N.D. Iowa 1994). Kellogg admits that Jennings meets the first two elements and will even concede the third element, regardless of whether the adverse employment action is seen as Jennings's discharge following the alleged sabotage or as the arbitrator's refusal to award her back pay. Kellogg contends, however, that Jennings cannot establish that similarly situated white and/or male Kellogg employees were treated differently.

I agree that Jennings cannot establish that she was treated differently when she was terminated. Kellogg accused two other employees besides Jennings of sabotage. Kellogg terminated all three employees at the same time. Both of the other employees were white; one was male. Yet only the white male and Jennings were reinstated following arbitration; the white female's termination was upheld. Jennings thus cannot demonstrate any racially disparate treatment in the termination process.

I also agree that as a matter of law, Jennings cannot establish that Kellogg discriminated against her with regard to the arbitrator's reinstatement award. Fr. Murphy was a neutral, impartial arbitrator whom the AFGM and Kellogg jointly chose to resolve the parties' claims. Jennings has offered no evidence that Fr. Murphy had either hidden allegiances to Kellogg or any vested interest in the outcome of the arbitration, or that he in any manner violated the Arbitrator's Code of Professional Responsibility. As Kellogg points out, Murphy could hardly have been an agent under Kellogg's control, given

his decision to reinstate Jennings after Kellogg had terminated her.

If Jennings believed that Fr. Murphy discriminated against her on the basis of her sex or race by reinstating her but not awarding her back pay, then her legal recourse would have been to appeal the arbitration award, not to sue Kellogg for discrimination when it implemented Fr. Murphy's decision. Moreover, Kellogg had no obligation to guarantee that the three arbitrators came to identical decisions or to deal with all three terminated employees as if they had. *Jones v. Frank*, 718 F. Supp. 931, 933-34 (S.D. Fla. 1989). *See also Wynn v. North American Systems, Inc.*, 608 F. Supp. 30, 34 (N.D. Ohio 1984).

Kellogg also argues that even assuming Jennings could establish a prima facie case of disparate treatment, its "zero tolerance" of conduct which destroyed or sabotaged company property or contaminated food products was a legitimate, nondiscriminatory reason for terminating Jennings's employment. Kellogg maintains that because such conduct could have a devastating impact on consumers of its food products, all Kellogg employees are told that any "deliberate abuse or destruction of company property, contamination of food, or sabotage" will result in discharge. Kellogg's Index, Ex. FF at 17-18. Kellogg's discharge-for-sabotage rule thus punishes any employee destroying company property or jeopardizing the health or safety of millions of consumers of Kellogg products. Jennings could hardly be unaware of the discharge-for-sabotage policy, given the length of her employment with Kellogg, nor could she have reasonably expected Kellogg to deviate from the policy once its internal investigation

indicated that the three employees had engaged in sabotage. Kellogg was entitled to enforce its policy. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("[E]mployment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.").

Finally, Kellogg argues that Jennings cannot show that its discharge-for-sabotage policy was a pretext and that discrimination was the real reason for its decision to terminate her. A plaintiff retains at all times the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996). If the analysis reaches this pretext stage, a plaintiff can avoid summary judgment only if the evidence considered in its entirety creates 1) a fact issue as to whether the employer's proffered reasons are pretextual, and 2) a reasonable inference that the particular trait (i.e., race, color, religion, sex, age, or national origin) was a determinative factor in the adverse employment action. *Id.* at 1336-37.

Jennings does not dispute the basic facts Kellogg has put forth. Kellogg accused three employees of sabotage. One was a white male, one was a white female, and one was Jennings – a black female. All three were investigated; all three received suspension hearings; all three were terminated; all three grieved their discharge through arbitration. The white man and the black woman were reinstated following arbitration; the white woman

was not. Despite Jennings's passionate but unsubstantiated arguments to the contrary in her many submissions, the racial and gender mix of the terminated employees precludes a finding that Jennings's termination was a pretext for intentional discrimination. The evidence also precludes any inference that Jennings's race and gender were determinative factors in Kellogg's decision to terminate her for her role in the alleged sabotage. Consequently, Jennings has not demonstrated the existence of specific facts that create a genuine issue on pretext. She has failed to establish as a matter of law that she was a victim of disparate treatment at the hands of her employer.

I turn next to the union's motion for summary judgment. The legal theory underlying Jennings's action against the AFGM is not entirely clear from her pleadings and submissions since they lack, for the most part, any citations to precedential legal authority. Jennings does not appear to claim that the AFGM violated a procedural provision of the collective bargaining agreements. Instead, her claim seems to be that the union failed to represent her fairly against Kellogg's charges that she sabotaged equipment at the Omaha facility. Jennings passionately maintains that because she did not engage in any sabotage, the arbitrator's decision that she had nevertheless approved of it must therefore be the result of the union's failure to represent her competently and fairly.

Jennings's pleadings and submissions detail her perceptions of the racial tensions at the Omaha facility prior to the alleged sabotage; recount her version of the events leading up to her discharge for sabotage; criticize the

presentation of evidence at the discharge hearing and arbitration; and personally attack the white female who was the principal witness against her, Mike Jens, the business agent for the AFGM, and counsel for the AFGM. She appears to claim that because the union's counsel failed to get her an award of back pay along with reinstatement, this court should set aside the arbitrator's decision,[1] declare her innocent of the sabotage charge, and award her back pay. Jennings asks too much.

Under the National Labor Relations Act, the AFGM has a statutory duty

> fairly to represent all . . . employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. 171, 177 (1967).

---

[1] I emphasize that Fr. Murphy's decision is not at issue in this lawsuit. Courts in this circuit, however, are obliged, however, to pay great deference to arbitrators' decisions. "Recognizing the 'strong policy favoring judicial enforcement of collective-bargaining contracts,' courts generally will not 'undertake to review the merits of arbitration awards, but [will] defer to the tribunal chosen by the parties . . . to settle their damages.' " *Carnes v. UPS, Inc.*, 51 F.3d at 117 (*quoting Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554, 562 (1976)).

The statute of limitations for bringing an action alleging a breach of the statutory duty of fair representation is six months. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 172 (1983). Here, Arbitrator Murphy handed down his decision on November 29, 1997. Jennings filed her complaint in the Tennessee federal court on June 3, 1998. Jennings thus missed filing her claim within the six-month window. Consequently, her claim against the AFGM for breach of its statutory duty of fair representation cannot stand.

Violation of a duty of fair representation, however, can also be the basis of a suit under Title VII. To establish a prima facie Title VII case against a union based on a breach of the duty of fair representation, a plaintiff must show that the union breached the duty and that the breach was motivated by the plaintiff's race, color, or sex. *Martin v. Local 1513*, 859 F.2d 581, 584 (8th Cir. 1988). *See also Carter v. Chrysler Corp.*, 173 F.3d 693, 704 (8th Cir. 1999) (plaintiff must produce evidence of union's "discriminatory animus").

The AFGM contends that throughout the grievance and arbitration process, it provided equally competent and zealous representation for all three Kellogg employees accused of sabotage. Jennings claims, however, that the AFGM abetted white witnesses in lying under oath because it had not adequately investigated their stories; failed to force Kellogg to take disciplinary action against the employees who, according to Jennings, allegedly lied; refused to allow her to testify on her own behalf at the arbitration hearing to rebut the white female employee's testimony, although she had already presented her side of the story during Kellogg's case in chief;

failed to inform her that she could appeal the arbitrator's award; and discriminated against her based on her race and gender. Filing No. 1, Complaint at 3-6.

The first element of a prima facie case for a breach of the duty of fair representation under Title VII occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. In addition, when a plaintiff alleges racial discrimination under Title VII, courts use the "same standard as that enunciated in other unfair representation cases." *Miller v. Coca Cola Bottling Co.*, 496 F. Supp. 1168, 1176 (D. Ark. 1980). The standard for determining whether a union has breached the duty of fair representation is a flexible one: "[S]o long as a union exercises its discretion in good faith and with honesty or purpose, a 'wide range of reasonableness must be allowed.' " *NLRB v. American Postal Wkrs. Union*, 618 F.2d 1249, 1255 (8th Cir. 1980) (*quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). "Mere negligence, poor judgment, or incompetence are insufficient to establish a breach of the duty of fair representation." *Carnes v. UPS, Inc.*, 51 F.3d 112, 116 (8th Cir. 1995). Thus, unless the record reveals some evidence of arbitrary, discriminatory, or bad faith conduct on the AFGM's part, Jennings's Title VII claim against the AFGM must fail.

I find that Jennings has not demonstrated that the union engaged in any arbitrary, discriminatory, or bad fath [sic] conduct against her. I have reviewed both parties' voluminous indexes of evidence, which include Kellogg's investigatory notes of the alleged sabotage that formed the basis for the suspension hearings for the three

employees; the transcripts of all three arbitration hearings, along with the parties' briefs submitted to the arbitrators; Jennings's many declarations and affidavits submitted at various stages of the proceedings, most of which attack the veracity of Mike Jens and the credibility of the white female employee who testified against her at the arbitration hearing; the discovery documents filed in this case, including Jennings's deposition; and the arbitrators' decisions. In over a thousand pages of material, I see no evidence that the AFGM failed to "exercise[ ] its discretion in good faith and with honesty or purpose."

The AFGM presented the cases of all three discharged employees to impartial arbitrators. Jennings and Jackson prevailed and as a result were reinstated; Margaret Welch, a white female, was terminated. It is difficult to understand how Jennings can now argue that the AFGM faltered in its representation of her, given that counsel for the AFGM managed to secure her reinstatement following charges that she had violated one of her employer's most absolute rules, the zero tolerance of sabotage.

Moreover, Jennings does not acknowledge that the AFGM had no control over the award Arbitrator Murphy designed after hearing all the evidence. Counsel for the union argued vigorously in his closing statement and in the grievant's brief that Jennings should be reinstated with full back pay and all rights. He also asked the arbitrator, in coming to a remedy, to consider the many mitigating factors should he find that Jennings had engaged in sabotage or a production slow-down. The arbitrator's decision makes it clear that he weighed the credibility of the witnesses, including the white female

employee who accused Jennings of sabotage and Jennings herself, in reaching his determination that Jennings "approved the sabotage although it was not shown that she actually engaged in it." For her disloyalty in approving the sabotage, the arbitrator ordered her reinstated but refused to grant her back pay. Since the union had no hand in fashioning this award, it would be unjust to hold the union responsible for it now. I find that Jennings cannot establish that the union breached its duty of fair representation.

Nor can Jennings present enough evidence of discrimination by the union to create a genuine issue of material fact as to the second element of a prima facie case, a showing of "discriminatory animus." While Jennings alleges that racial tensions were high at Kellogg's Omaha plant following her transfer from Memphis, she cannot connect those tensions to the AFGM's handling of her suspension hearing and arbitration. Nor can she refute the bare facts: Margaret Welch, a white female, lost her job for her acts of sabotage, while Don Jackson, a white male, and Jennings, a black female, both regained their positions. That Jackson also received full back pay from the arbitrator who decided his case does not establish that the union "intentionally and invidiously discriminated against" Jennings. *Carter v. Local No. 789*, 963 F.2d 1078, 1082 (8th Cir. 1992). Jackson's award means only that his arbitrator weighed the evidence and the credibility of the witnesses – including the white female employee and Jennings herself – differently in reaching his conclusion that Kellogg had failed to prove by clear and convincing evidence that Jackson "tampered with machinery in a negative way, or . . . stated that he

intended to do so." Filing No. 137A, AFGM's Index of Evidence Supporting Motion for Summary Judgment, Jackson Arbitration Decision at 12. Jennings simply has not offered any competent evidence to create a factual question about whether the arbitrator's decision to deny her back pay was a result of the union's breach of its duty of fair representation or of the union's "invidious discrimination" against her motivated by her race, color, or gender.

Jennings also maintains that the union failed her by not appealing the arbitrator's award. Plaintiff's Brief Opposing AFGM's Motion for Summary Judgment at 4. She claims that she did not appear before the union's executive board to request an appeal of the arbitrator's decision because counsel for the union allegedly told her that the arbitrator's decision was final and that she had no recourse. Filing No. 176, AFGM's Supp. Index of Evidence, V. Jennings Dep. 92:14-23. She also states, however, that she believes she in fact "appealed" the arbitrator's decision to withhold back pay by filing her EEOC claim. *Id.*, 93:3-5. She states that if she prevails in this Title VII case, she will receive as *minimum* damages what the arbitrator withheld from her – back pay – and what Kellogg denied her – five weeks' vacation pay.

The AFGM responds that while Jennings may claim that she did not know she could appeal, Jennings was nevertheless aware that she could have taken up the possibility of an appeal with the executive board because she previously had appeared before the board to demand that the union arbitrate her dismissal. Nor, the union notes, did Jennings ever appeal to the executive board Kellogg's rejection of her second grievance for back pay

following the arbitrator's decision, electing instead to proceed with this Title VII action. Finally, the union argues that an appeal of the arbitrator's decision would have been futile because Jennings cannot identify specific errors on the arbitrator's part that would justify a reversal of the award, apart from her belief that the arbitrator did not understand how the line worked. *Id.*, 101:1-105:4.

I conclude that Jennings was well aware of her options under the union's constitution and by-laws as a long-time union member, as indicated by her post-discharge appearance before the union's executive board to demand that the union take her case to arbitration. Following the arbitrator's decision, Jennings apparently elected to by-pass the executive board entirely and instead to pursue her remedies with the EEOC and this court. She is now bound by her decision. The record contains no evidence from which I can infer that the union acted arbitrarily or with a discriminatory motive in not processing an appeal of the arbitrator's decision.

Given my decision granting the defendants' motions for summary judgment and denying the plaintiff's motion for summary judgment, all remaining motions are hereby denied as moot.

IT IS THEREFORE ORDERED:

1. Kellogg's motion (Filing No. 130) for summary judgment is granted.

2. AFGM's motion (Filing No. 136) for summary judgment is granted.

3. Jenning's motion (Filing No. 199) entitled "Plaintiff's Memorandum in Support of Petition for Summary Judgment" is denied.

4. The following motions are denied as moot: Filing Nos. 154, 159, 161, 162, 163, 166, 169, 177, 179, 180, 181, 185, 188, 190, 191, 192, 193, 194, 195, 200, and 205.

DATED this 18 day of May, 2000.

BY THE COURT:

/s/ Joseph F Bataillon
Joseph F. Bataillon
United States District Judge

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

VISHNUE I. JENNINGS, Plaintiffs, vs. KELLOGG USA, INC., and AMERICAN FEDERATION OF GRAIN MILLERS LOCAL NO. 50, Defendants.	)	8:98CV423 **ORDER** (Filed Dec. 10, 1999)

The parties appeared before me on a hearing concerning the defendant's motion (Filing No. 120) to dismiss the plaintiff's complaint for employment discrimination. The plaintiff, who is pro se, appeared telephonically. The defendants argued that because the plaintiff allegedly misrepresented her assets in the affidavit supporting her motion to proceed in forma paueris, her complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2).

I find that although the plaintiff's allegations of poverty were likely correct when she first filed this action in the United States District Court for the Western District of Tennessee in June 1998, her financial condition has improved and she no longer qualifies to proceed in forma pauperis. Accordingly,

IT IS ORDERED that

1. The defendant's motion to dismiss (Filing no. 120) is again taken under advisement pending

the plaintiff's payment of the filing fee for this case; and

2. The plaintiff shall pay the filing fee of $150.00 to the Clerk of District Court for the District of Nebraska no later than the close of business on January 31, 2000, or face dismissal of her complaint.

DATED this 10 day of December, 1999.

BY THE COURT:

/s/ Joseph F. Bataillon
Joseph F. Bataillon
United States
District Judge

APPENDIX 3

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2779

Vishnue L. Jennings, Appellant, v. Kellogg USA, Inc.; American Federation of Grain Millers, Local #50, Appellees.	* * * * * * * * *	Appeal from the United States District Court for the District of Nebraska. [UNPUBLISHED]

Submitted: June 7, 2001

Filed: June 12, 2001

Before MORRIS SHEPPARD ARNOLD, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

PER CURIAM.

Vishnue L. Jennings appeals the district court's adverse grant of summary judgment in Jennings's employment discrimination action. After de novo review of the record and a thorough review of the parties' submissions, *See LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 690 (8th Cir. 2001) (standard of review), we conclude summary judgment for defendants was appropriate.

Accordingly, we affirm for the reasons stated in the district court's opinion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

VISHNUE L. JENNINGS,	)	**8:98CV423**
Plaintiff,	)	
vs.	)	**ORDER**
KELLOGG USA, INC., and AMERICAN FEDERATION OF GRAIN MILLERS LOCAL NO. 50,	)	(Filed Sept. 3, 1999)
Defendants.	)	

This matter is before the court on the following motions:

Plaintiff's motion to compel (Filing No. 57);

Defendant American Federation of Grain Millers Local No. 50's ("AFGM") motion to strike demand for trial by jury (Filing No. 60);

Plaintiff's motion to compel and for sanctions (Filing No. 64);

Defendant Kellogg's motion to strike (Filing No. 65);

Defendant Kellogg's motion to quash subpoenas (Filing No. 80); and

Defendant AFGM's motion to strike pleading (Filing No. 89).

Background

This action arises out of the plaintiff's employment relationship with Kellogg. The plaintiff was employed at the Kellogg's Memphis factory until February 1996, when she transferred to the Omaha facility. In September 1996, Kellogg and AFGM began negotiating a master bargaining agreement. On September 28, 1999, the date the prior agreement was to expire, the Union members approved a strike to begin at midnight if a new agreement was not reached. Kellogg states, on that night, the plaintiff's line, Line 109, was sabotaged. Kellogg states another employee, Joyce Platt accused the plaintiff and Don Jackson (Jackson) of the intentional sabotage. Kellogg states Tim Silsbee, the Director of Human Resources, investigated that incident and other incidents of sabotage. The investigation led to the plaintiff's suspension and eventual termination from Kellogg. Jackson and another employee, Peggy Welch, were also terminated for sabotage. The plaintiff and AFGM jointly filed a grievance, which went through arbitration. The plaintiff was reinstated with Kellogg, but did not receive an award of backpay. Jackson was reinstated with backpay. **See** Kellogg's Brief, 1-3. The plaintiff now seeks relief under Title VII of the Civil Rights Act based upon racial and gender discrimination. **See** Filing No. 1.

Plaintiff's Motion to Compel
(Filing Nos. 57 and 64)

The plaintiff moves this court to compel Defendant Kellogg to answer interrogatories and produce documents. **See** Filing No. 57. The plaintiff served Kellogg

with interrogatories and requests for production April 6, 1999. Kellogg served its response on May 7, 1999. The plaintiff served additional interrogatories on June 15, 1999 to be answered by Greg Ondracek and Joyce Platt. Kellogg served a response on June 28, 1999. The plaintiff alleges Kellogg has evasively answered Interrogatory Nos. 1-13, which were served on April 6, 1999. The plaintiff alleges Kellogg has failed to produce documents pursuant to Request Nos. 2-15. The plaintiff alleges Kellogg has refused to answer the interrogatories served on June 15, 1999.

Preface

Relevance

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1)." Fed. R. Civ. P. 33(c). Similarly, requests for production are bound by Rule 26(b). Fed. R. Civ. P. 34(a).

Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy, for purposes of discovery, has been defined by the United States Supreme Court as encompassing "any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." ***Oppenheimer***

Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any issue in the case and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action. **See** ***Marker v. Union Fidelity Life Ins. Co.,*** 125 F.R.D. 121 (M.D.N.C. 1989); ***Morse Diesel, Inc. v. Fidelity & Deposit Co.,*** 122 F.R.D. 447 (S.D.N.Y. 1988). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." ***Hickman v. Taylor,*** 329 U.S. 495, 507 (1947). "To assess relevance in a given case, the court must view the matter in light of the specific claims and defenses asserted by the parties." ***Fletcher v. Atex, Inc.,*** 156 F.R.D. 45, 48 (S.D.N.Y. 1994) (citations omitted).

"Discovery is not to be denied because it relates to a claim or defense that is being challenged as insufficient." Wright, Miller & Marcus, ***Federal Practice and Procedure*** at § 2008. "[I]t is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." ***Id.*** "Ordinarily, in ruling on a discovery motion, the Court will not determine whether a claim in the complaint, if proved, would have a bearing on the ultimate outcome of the action, it being sufficient that the matter to be explored is relevant to the issues made by the pleadings." ***Apel v. Murphy,*** 70 F.R.D. 651, 654 (D.R.I. 1976), **citing** ***Humphreys Exterminating Co., Inc. v. Poulter,*** 62 F.R.D. 392 (D.Md. 1974). Courts have recognized that until claims or defenses are stricken out, they are treated as valid in relation to discovery requests. ***Paramount Film Distributing Corp v. Ram,*** 15

F.R.D. 404, 405 (E.D.S.C. 1954); ***Riordan v. Ferguson,*** 2 F.R.D. 349, 350 (S.D.N.Y. 1942).

1. Interrogatories

Federal Rule of Civil Procedure 33 provides:

> Without leave of court or written stipulation, *any party may serve upon any other party written interrogatories,* not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by *any officer or agent, who shall furnish such information as is available to the party.* Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

Fed. R. Civ. P. 33(a) (emphasis added).

Interrogatories may only be directed to a party to an action. ***University of Texas at Austin v. Vratil,*** 96 F.3d 1337, 1340 (10th Cir. 1996). "It is not proper to address interrogatories to potential witnesses who were not parties to the litigation even though they are employed by a party." ***Thomas v. Biller,*** 1989 WL 47710, *2 (E.D.N.Y. 1989). When the party is a corporation, Rule 33(a) allows it to select an officer or agent to respond to interrogatories on its behalf. ***University of Texas,*** 96 F.3d at 1340. However, the party serving the interrogatories may not select the particular officer or agent of the corporation

and direct the interrogatories by name. ***Wirtz v. I.C. Harris & Co.,*** 36 F.R.D. 116, 117 (E.D.Mich. 1964).

Rule 33(a) in its provisions for serving and answering interrogatories to corporations, states that whatever officer or agent of the corporation is chosen to answer on behalf of the corporate party, he must "furnish such information as is available to the party." The rule has been construed to place on the responding corporation a duty to inquire of appropriate employees before submitting its answers. ***General Dynamics Corp. v. Selb Mfg. Co.,*** 481 F.2d 1204, 1210 (8th Cir. 1973) **cert. denied,** 414 U.S. 1162 (1974). In fact, a corporation is "duty bound to secure all information available to [answering agent], including information within the personal knowledge of past and present employees." ***Id.*** Moreover, knowledge of officers and employees of a corporation, if relevant to the subject matter of an interrogatory or production request directed to the corporation, may be imputed to the corporation itself. ***Id.*** at 1210-11. Therefore, "[a] corporation's answers must include facts and knowledge of its agents and any person under its control." ***Gerling Intern. Ins. Co. v. C.I.R.,*** 839 F.2d 131, 138 (3d. Cir. 1988) citing 4A Moore's ***Federal Practice,*** ¶ 33.26 at 33-154-56. However, "[i]f the answers are not available after reasonable inquiries to defendant's employees who have knowledge of the alleged incident, the answer may so state." ***Ballard v. Allegheny Airlines, Inc.,*** 54 F.R.D. 67, 69 (E.D. Pa. 1972). Interrogatories are objectionable where they "call for such subjective answers, so peculiarly within the knowledge of individuals, and not chargeable to defendant, that no responsive objective answer could be expected." ***Ballard,*** 54 F.R.D. at 69. These individual employees can only

be examined as witnesses pursuant to proper notice and service of subpoenas. **See *Krauss v. Erie R. Co.*,** 16 F.R.D. 126 (S.D.N.Y. 1954).

Federal Rule of Civil Procedure 33 further provides:

> (b)(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.
>
> * * *
>
> (b)(4) *All grounds for an objection to an interrogatory shall be stated with specificity.* Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

Fed. R. Civ. P. 33 (emphasis added). The Advisory Committee Notes state that "objections must be specifically justified, and . . . unstated or untimely grounds for objection ordinarily are waived." ***Advisory Committee Notes, Fed. R. Civ. P.*** 33 (1993 Amendments). The party opposing the motion to compel has the burden to show that its objections are valid by providing explanation or factual support. ***Burnett v. Western Resources Inc.,*** 1996 WL 134830, *4 (D.Kan. 1996).

"Bare assertions that discovery requested is overly broad, unduly burdensome, oppressive or irrelevant are ordinarily insufficient . . . to bar production." ***Pulsecard, Inc. v. Discover Card Services, Inc.,*** 1996 WL 397567 *1, 2 (D.Kan. 1996), **quoting *Continental Ill. Nat'l Bank & Trust v. Caton,*** 136 F.R.D. 682, 685 (D.Kan. 1991). "The

ritual use of language such as 'overly broad and burdensome' in boilerplate 'general objections' to document requests raises no meaningful issue, and affords no legally sufficient basis for refusing to produce documents within the scope of the request." ***Flynn v. Goldman, Sachs, & Co.,*** 1991 WL 238186 *1, 3 (S.D.N.Y. 1991), **citing** ***AT&T v. New York City Human Resources Admin.,*** 1991 WL 79461 at *5 (S.D.N.Y. 1991).

"The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity. . . . Respondents should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories. To clarify their answers, respondents may include any necessary, reasonable definition of such terms or phrases." ***Pulsecard,*** 1996 WL 397567 *1, 2.

It is insufficient for the party objecting to discovery based on relevance to simply make conclusory allegations that the request is irrelevant. ***Burnett v. Western Resources Inc.,*** 1996 WL 134830, *4 (D.Kan. 1996). If the discovery sought appears relevant, the opposing party bears the burden of specifically show [sic] how each discovery request is irrelevant. ***Id.***

2. Requests for Production

Fed. R. Civ. P. 34 provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . , or to inspect and copy, test, or sample any tangible things which

> constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served[.]
>
> * * *
>
> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

"A failure to make a timely objection to a request for production or interrogatories results in a waiver of any otherwise-valid objections." ***Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co.,*** 109 F.R.D. 12, 24 (D.Neb. 1985) (citations omitted). Additionally, "[a]ll discovery requests are a burden on the party who must respond thereto. Unless the task of producing or answering is unusual, undue or extraordinary, the general rule requires the entity answering or producing the documents to bear that burden." ***Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Caton,*** 136 F.R.D. 682,

684-85 (D.Kan. 1991) (citation omitted). Finally, the District Court has discretion to limit the scope of discovery, if it has a good reason to do so. ***Credit Lyonnais v. SGC Int'l, Inc.***, 160 F.3d 428, 431 (8th Cir. 1998).

Requests should identify categories of documents with reasonable precision. ***Schartz v. Unified School District No. 512***, 1996 WL 741384, *1 (D.Kan. 1996). "If an omnibus phrase modifies a sufficiently specific type of information or documents, the request may survive an objection that it is overly broad." ***Id.*** (concluding request seeking all documents used to calculate damages and request seeking all documents for the plaintiff's accounts were sufficiently precise).

Discussion

The court has reviewed the plaintiff's interrogatories and requests for production and Kellogg's responses. Based on the foregoing, the court will analyze the interrogatories, requests for production and responses below.

1. April 6, 1999 Interrogatories

Interrogatory Nos. 1-10, 12, and 13: Kellogg responded to Interrogatory Nos. 1-10, 12, and 13 by stating:

> [Kellogg] objects to [the Interrogatory] in that it is overly broad, vague and unduly burdensome. [Kellogg] further objects to [the Interrogatory] in that it is not reasonably calculated to lead to the discovery of admissible evidence.

The bare assertions made by Kellogg are legally insufficient to shield Kellogg from responding to the plaintiff's interrogatories. ***Pulsecard,*** 1996 WL 397567 at 2. Furthermore, conclusory allegations place the burden on the objecting party to show overbreadth, vagueness, undue burden and irrelevance. ***Id.; Burnett,*** 1996 WL 134830 at 4. Kellogg has failed to show that its objections are valid by providing any explanation or factual support, thereby failing to meet its burden. In its brief, Kellogg merely restates the interrogatories and its own bald allegations. **See** Kellogg's Brief, p. 5-9. Kellogg argues it does not know "who" the plaintiff is referring to in the interrogatories when she makes reference to "you." ***Id.*** However, the plaintiff makes it clear she is referring to Tom Silsbee, as Kellogg notes in its brief. ***Id.*** Consistent with this assumption, interrogatory respondents should exercise reason if faced with uncertainty and may clarify their own answers based on their interpretations of the questions. ***Pulsecard,*** 1996 WL 397567 at 2. Kellogg's objections in Request Nos. 1-10, 12, and 13 are overruled, and Kellogg shall respond accordingly.

Interrogatory No. 11: Interrogatory No. 11 states:

> Please state if Don Jackson was treated any different from Vishnue Jennings regarding events surrounding their discharge and reinstatement by specifying: (a) if so, why? (b) if not, why not? (c) Any proof or evidence that plaintiff was not discriminated against because of her race, color, or sex in regard to that treatment.

Kellogg responded:

> Plaintiff was terminated by Kellogg. Don Jackson, a white male, was not treated differently

> than Plaintiff – he was terminated by Kellogg. Margaret Welch, a white female, was also not treated differently than Plaintiff – she was also terminated by Kellogg.

Kellogg has not objected to this interrogatory. However, the court finds no further response is necessary as Kellogg has stated Jackson was not treated differently than the plaintiff.

The plaintiff argues Kellogg refuses to verify its responses. **See** Plaintiff's Brief, p. 1. The court notes Timothy J. Silsbee verified Kellogg's May 7, 1999 responses to the April 6, 1999 interrogatories. Therefore, no further verification is necessary of the responses already given.

2. Requests for Production

Request Nos. 2-4, and 11-15: The plaintiff requests the statements of Greg Ondracek, Joyce Platt, and Don Jackson, as well as Kellogg company reports related to specific processing lines for a specified period. Kellogg responded to Request Nos. 2-4, and 11-15 by stating:

> [Kellogg] objects to [the Request] in that it is overly broad, vague and unduly burdensome. [Kellogg] further objects to [the Request] in that it is not reasonably calculated to lead to the discovery of admissible evidence.

The plaintiff requests statements of individuals directly involved in the plaintiff's termination or, like the plaintiff, accused of sabotage. The company documents sought by the plaintiff are from, or presumably near, the line where the plaintiff worked. The documents are for a

period of six months including the date of the event for which the plaintiff was terminated. The court notes the plaintiff's requests appear relevant to her termination and to her burden of showing discrimination and pretext. The party opposing production has the burden of demonstrating that the requested discovery either does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. ***Burnett v. Western Resources Inc.,*** 1996 WL 134830, *4 (D.Kan. 1996). Kellogg fails to meet this burden, making no argument but to reiterate the bald statements of its original response. **See** Defendant's Brief, p. 10-12.

The plaintiff requests a statement of each person, Greg Ondracek, Joyce Platt, and Don Jackson. Although, the plaintiff does not specify dates, neither does she state "all" statements nor the plural, statements. **See *Schartz,*** 1996 WL 741384, *1 (D.Kan. 1996). The parties should use reason and common sense with regard to discovery requests. ***Pulsecard,*** 168 F.R.D. at 310. The court notes further delays in discovery would result if the plaintiff were required to submit additional requests. In reading the plaintiff's request, the court takes the plaintiff to be requesting each person's statement made regarding events leading to the plaintiff's termination. **See *Credit Lyonnais,*** 160 F.3d at 431. The plaintiff's request for company reports of specific processing lines for a specific period of time, Request Nos. 11, 13, 14, 15, are clear, specific and narrowed to a reasonable period. Request No. 12 does not specify a time period, therefore, absent

agreement between the parties, the time period will be the same as in Request No. 13, September 28, 1996 through October 2, 1996. **See** ***Miles v. Boeing Co.,*** 154 F.R.D. 117, 120 (E.D.Pa. 1994) (production documents relevant to show employer's general policy and practice for period of employment plus two years after). Therefore, Kellogg shall produce to the plaintiff all documents responsive to Requests 2-4, 11-15 as set forth herein.

Request Nos. 5 and 8: Kellogg did not object to Request Nos. 5 and 8. Kellogg states it has provided the plaintiff with responsive documents. **See** Kellogg's Brief, p. 10. The plaintiff indicates Kellogg has not provided such documents. The court finds that to the extent Kellogg has not fully responded to these Requests, Kellogg must supplement its production.

Request Nos. 6 and 7: The plaintiff seeks copies of Greg Ondracek's and Joyce Platt's personnel file in Request Nos. 6 and 7, respectively. Kellogg objects arguing the plaintiff indicated she already has a copy of Greg Ondracek's personnel file and neither file appears to be relevant. **See** Kellogg's Brief, p. 11.

Although, the fact that plaintiff may have documents is insufficient (***Walt Disney,*** 168 F.R.D. at 284; ***Cook,*** 161 F.R.D. at 105), a threshold showing of relevance is necessary before production of information, which does not reasonably bear on the issues in the case, is required. ***Hofer v. Mack Trucks, Inc.,*** 981 F.2d 377, 380 (8th Cir. 1993). Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to

their case. See *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972). Generally, the confidential information kept in personnel files is not discoverable. *Knoll v. American Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th Cir. 1999) (Plaintiff not allowed to discover personnel file of a non-party employee.). However, in *Onwuka*, the court found co-employee files relating to discipline based on violations of certain employer policies were relevant to discrimination and retaliation claims. *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508 (D.Minn. 1997). In this case, unlike in *Onwuka*, the plaintiff does not allege she is similarly situated to the employees whose files she seeks. The plaintiff has not made a threshold showing of relevance with regard to a non-party, employee's personnel file. Therefore, Kellogg's objection is sustained, and Kellogg will not be compelled to provide Joyce Platt's or Greg Ondracek's personnel files.

Request Nos. 9 and 10: In Request Nos. 9 and 10, the plaintiff seeks a copy of a letter regarding harassment posted on Kellogg's bulletin board during the summer of 1996, and all minutes of the Labor Relations' meeting pertaining to the alleged sabotage, respectively. Kellogg responded to Request Nos. 9 and 10 by stating, "[Kellogg] objects to [the Request] in that it is not reasonably calculated to lead to the discovery of admissible evidence. In addition, Plaintiff indicated on page 3 of the Parties Report of Rule 26(f) Planning Conference that she is already in possession of [these documents]."

The court notes the documents requested by the plaintiff in Request Nos. 9 and 10 appear relevant to the issues surrounding her termination and relevant to her burden of showing pretext. See *Miles v. Boeing Co.*, 154

F.R.D. 117, 120 (E.D.Pa. 1994) (documents relevant to show employer's general policy and practice with respect to employment of protected class). Accordingly, the party opposing production has the burden of demonstrating that the requested discovery either does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. ***Burnett v. Western Resources Inc.***, 1996 WL 134830, *4 (D.Kan. 1996). Kellogg fails to meet this burden by making no argument.

An objection based on information that the moving party is already in possession of documents it seeks to obtain by inspection, is an insufficient response to interrogatories; a defendant is required to produce documents in its possession, custody or control, regardless of whether it believed that plaintiff already had those documents. ***Walt Disney Co. v. DeFabiis,*** 168 F.R.D. 281, *284 (C.D.Cal. 1996); ***Cook v. Rockwell Intern. Corp.,*** 161 F.R.D. 103, 105 (D.Colo. 1995). Therefore, Kellogg's objections are overruled. Kellogg shall produce to the plaintiff a copy of the letter regarding harassment posted on Kellogg's bulletin board during the summer of 1996, and all minutes of the Labor Relations' meeting pertaining to the alleged sabotage.

3. June 15, 1999 Interrogatories

The plaintiff served Kellogg with two sets of interrogatories on June 15, 1999, with requests that one set be

answered by Joyce Platt[1] and the other be answered by Greg Ondracek. The plaintiff stated under the caption:

> PLAINTIFF REQUESTS THAT THESE INTERROGATORIES BE ANSWERED BY GREG ONDRACEK AND THAT THEY ARE BEING SERVED AGAIN UPON DEFENDANT KELLOGG COMPANY'S ATTORNEY'S [sic] BECAUSE FRCP ALLOWS INTERROGATORIES TO YOUR EMPLOYEES.

Kellogg responded,

> COMES NOW the Defendant, Kellogg Company ("Kellogg"), by and through counsel undersigned, and objects to all of the following Plaintiff's Interrogatories served upon Kellogg for Joyce Platt [Greg Ondracek] to personally answer on the grounds that Ms. Platt [Mr. Ondracek] is not a party to this action, nor is she [he] an officer or agent of Kellogg, as required by Federal Rules of Civil Procedure 33.

The court notes the plaintiff served interrogatories on a party, Kellogg, however, she directed the interrogatories to be answered by a particular individual, employed by Kellogg. Kellogg, a corporation, has a duty to answer interrogatories through an officer or agent utilizing all of the information available to Kellogg and those under its control. **See** Fed. R. Civ. P. 33(a); ***Gerling,*** 839 F.2d at 138.

---

[1] Statement regarding Joyce Platt reads:

> PLAINTIFF REQUESTS AGAIN THAT THESE INTERROGATORIES BE ANSWERED BY JOYCE PLATT AND THAT THEY ARE BEING SERVED UPON DEFENDANT KELLOGG COMPANY'S ATTORNEY BECAUSE SHE IS YOUR EMPLOYEE AND FRCP ALLOWS THESE INTERROGATORIES.

The plaintiff, however, may not direct the interrogatory to an individual non-party, even though that individual may be an employee of a party. **See *Thomas v. Biller,*** 1989 WL 47710, *2 (E.D.N.Y. 1989). The court notes the interrogatories posed by the plaintiff and directed to each Joyce Platt and Greg Ondracek seek personal and objective responses, particularly within the knowledge of these witnesses. Such interrogatories are subject to objection and the responses may not be imputed against the corporation. **See *General Dynamics,*** 481 F.2d at 1210-11; ***Ballard,*** 54 F.R.D. at 69. Therefore, Kellogg's objections are sustained and no responses by Kellogg will be required with regard to both sets of interrogatories served on June 15, 1999 and directed to each Joyce Platt and Greg Ondracek.

4. Sanctions

The plaintiff requests fees for her motion in this matter. Rule 37(a)(4)(A) provides:

> If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court

> action, or that the opposing party's non-disclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

"At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification." ***Advisory Committee Notes, Fed. R. Civ. P.*** 37(a)(4) (1970). The court notes that, in the present case, the motion will be denied. In viewing the circumstances of this case, the motion to compel, and the parties' briefs, the court finds some of the defendant's arguments were substantially justified[2] and no fees or costs should be awarded in this matter.

The court notes the issues raised in the plaintiff's motion to compel (Filing No. 64) are substantially similar to those raised in her motion to compel (Filing No. 57) discussed herein. The resolution of Filing No. 57 leaves no issues for the courts consideration under Filing No. 64. Therefore, the plaintiff's motion to compel and for sanctions (Filing No. 64) is denied as moot.

Similarly, the portion of Kellogg's motion to strike (Filing No. 65), which seeks to strike the plaintiff's motion to compel (Filing No. 64) and attached documentation is rendered moot, and denied. Kellogg sought to strike the plaintiff's motion to compel (Filing No. 64) and

---

2 "Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule." Charles A. Wright, et al., ***Federal Practice and Procedure*** § 2288 (2d ed. 1994).

attached documentation, arguing the filing and documents were duplicative. **See** Filing No. 65. The remaining arguments in Kellogg's motion will be addressed herein.

Kellogg's Motions to Strike Interrogatories (Filing No. 65)

Kellogg moves this court to strike interrogatories served on July 22, 1999 because the interrogatories state "To Company Managers." **See** Filing No. 65. The court notes, the plaintiff served the interrogatories on a party, Kellogg. Kellogg is a corporation who shall have an officer or agent furnish information as is available to Kellogg. Fed. R. Civ. P. 33(a). The interrogatories do not seek information that is so subjective to a particular individual that the answer cannot be chargeable to Kellogg. **See** ***Ballard,*** 54 F.R.D. at 69. The court notes, the plaintiff does not address these interrogatories to a particular person, but to a general category of persons at Kellogg who are under its control and may have pertinent knowledge. Therefore, the portion of Kellogg's motion which seeks to strike the interrogatories served on July 22, 1999 to Kellogg stating "To Company Managers" is denied. Kellogg shall serve the plaintiff a response to these interrogatories in accordance with the Federal Rules of Civil Procedure.

Defendants' Motions to Strike Demand for Trial by Jury (Filing Nos. 60 and 65)

The plaintiff filed her complaint on June 3, 1998, in the United States District Court for the Western District of Tennessee. **See** Filing No. 1. The case was transferred to the District of Nebraska by order dated August 17,

1998. **See** Filing No. 14. The defendants, AFGM and Kellogg, answered the complaint on August 24, 1998 (Filing No. 19), and September 1, 1998 (Filing No. 20), respectively. The plaintiff made a demand for a jury trial on July 19, 1999. **See** Filing No. 58. Both defendants move to strike the plaintiff's demand for a trial by jury.

The plaintiff brought the instant action pursuant to Title VII of the Civil Rights Act of 1964 for employment discrimination. **See** Filing No. 1. Jury trials are available in Title VII claims. ***Landgraf v. USI Film Products,*** 511 U.S. 244, 248 (1994); ***Walker v. Columbia Univ.,*** 1998 WL 567909, at *1 (S.D.N.Y. 1998); **see generally** ***Hathaway v. Runyon,*** 132 F.3d 1214, 1221 (8th Cir. 1997). The Civil Rights Act of 1991 provides that any party may demand a trial by jury if compensatory or punitive damages are sought. **See** 42 U.S.C. § 1981a(c) (1994), as added by § 102 of the 1991 Act. For claims arising prior to the 1991 amendment, Title VII plaintiffs are not entitled to jury trials. ***Harmon v. May Broadcasting Co.,*** 583 F.2d 410 (8th Cir. 1978).

Rule 38(a) states that the right of trial by jury as declared by the Seventh Amendment, or as given by federal statute, "shall be preserved to the parties inviolate." The procedure governing requests for a trial by jury in a civil matter is set forth in Fed. R. Civ. P. 38, which provides:

> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and *not later than 10 days after the service of the last pleading* directed to such

> issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.
>
> * * *
>
> (d) Waiver. *The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.* A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Fed. R. Civ. P. 38 (emphasis added). A party's failure to demand a jury within the ten-day period following service of the last pleading to that issue, such as an answer to the complaint, waives the right to a jury trial. Fed. R. Civ. P. 38(b), 38(d). When a plaintiff asserts the right to a jury trial after the time for making a jury demand has expired under Rule 38(b), there is a presumption that waiver occurred. ***Wright v. Lewis,*** 76 F.3d 57, 60 (2d Cir. 1996).

The court, however, has discretion to relieve the plaintiff of such a waiver and order a jury trial upon the plaintiff's motion. Fed. R. Civ. P. 39(b).

> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Fed. R. Civ. P. 39(b). The Eighth Circuit Court of Appeals stated the district courts "ought to approach each application under Rule 39(b) with an open mind," based on the

circuit's viewpoint that "jury trials ought to be liberally granted when no prejudice results." ***Littlefield v. Fort Dodge Messenger,*** 614 F.2d 581, 585 (8th Cir. 1980) (citation omitted), **cert. denied,** 445 U.S. 945 (1980). Even so, "despite the discretionary language of Rule 39(b) some cause beyond mere inadvertence must be shown to permit granting an untimely demand." ***Raymond v. International Bus. Machines Corp.,*** 148 F.3d 63, 66 (2d Cir. 1998) (citation omitted). Furthermore, the delay in requesting a jury, with no explanation, weighs strongly against the motion. ***United States v. Lochamy,*** 724 F.2d 494, 499 (5th Cir. 1984).

The plaintiff had the statutory right to a trial by jury because the plaintiff's claims are brought pursuant to Title VII of the Civil Rights Act. **See** § 1981a(c). The plaintiff had ten days after Kellogg filed its answer, or September 11, 1998, to demand a trial by jury. **See** Fed. R. Civ. P. 38(b). However, the plaintiff did not timely demand a jury trial. The plaintiff moved for a jury trial on July 19, 1999, nearly eleven months after the defendants answered her complaint. Therefore, the plaintiff waived her statutory right to a trial by jury for failure to timely file a demand. **See** Fed. R. Civ. P. 38(d). The court notes discovery is nearly completed and the case is set for a non-jury trial. The court, in its discretion pursuant to Fed. R. Civ. P. 39(b), refuses to relieve the plaintiff of her waiver. The plaintiff fails to show any cause why her untimely demand should be granted. **See *Raymond,*** 148 F.3d at 66. The plaintiff has offered no explanation for her failure to timely request a jury in this case. **See *Lochamy,*** 724 F.2d at 499. Accordingly, the defendants' motions to

strike the plaintiff's jury demand (Filing Nos. 60 and 65) are granted.

Kellogg's Motion to Quash Subpoenas (Filing No. 80)

Kellogg filed a motion to quash the subpoenas of Michael Jens and M.H. Weinberg. **See** Filing No. 80. Kellogg argued the subpoenas were not issued in accordance with Fed. R. Civ. P. 45(c) nor were the defendants given notice pursuant to Fed. R. Civ. P. 30(b). In a telephone conference with the parties on August 24, 1999, the plaintiff conceded she did not provide notice. Thereupon the parties agree to proceed with the depositions on August 26, 1999. The court held Kellogg's motion to quash in abeyance pending the depositions. **See** Filing No. 87. The court has received no notice of further insufficiency of subpoenas regarding the depositions. Therefore, Kellogg's motion to quash (Filing No. 80) is denied as moot.

AFGM's Motion to Strike Pleading (Filing No. 89)

The plaintiff delivered a document entitled "Plaintiff's Letter to Magistrate Judge Thomas D. Thalken" on August 24, 1999. The document was not filed with the clerk's office as a pleading. Therefore, AFGM's "Motion to Strike Pleading Titled: Plaintiff's Letter to Magistrate Judge Thomas D. Thalken" is denied as moot.

IT IS ORDERED:

1. The plaintiff's motion to compel (Filing No. 57) is denied in part and granted in part as set forth herein. The plaintiff's motion to compel supplemental responses to

Interrogatory No. 11, Request Nos. 6, 7, and Interrogatories directed to Joyce Platt and Greg Ondracek, is denied. The plaintiff's motion to compel a supplemental response to Interrogatory Nos. 1-10, 12, 13, and Request Nos. 2-5, 8-15 is granted.

2. Kellogg shall have to **on or before September 24, 1999,** to provide supplemental responses as set forth herein.

3. The plaintiff's request for costs (Filing No. 48) is denied.

4. The plaintiff's motion to compel and for sanctions (Filing No. 64) is denied as moot.

5. AFGM's motion to strike the plaintiff's jury demand (Filing No. 60) is granted.

6. Kellogg's motion to strike (Filing No. 65) is granted in part and denied in part as set forth herein. Kellogg's motion to strike the plaintiff's jury demand is granted. The remainder of Kellogg's motion is denied as moot.

7. Kellogg's motion to quash (Filing No. 80) is denied as moot.

8. AFGM's motion to strike pleading (Filing No. 89) is denied as moot.

ADMONITION

Pursuant to NELR 72.3 any appeal of this Order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this Order. Failure to timely appeal may constitute a waiver of any objection to

the Order. The brief in support of any appeal shall be delivered to Judge Joseph F. Bataillon at the time of filing such appeal. Failure to submit a brief in support of any appeal may be deemed an abandonment of the appeal.

DATED this 3rd day of September, 1999.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States
Magistrate Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

VISHNUE L. JENNINGS,	)	8:98CV423
Plaintiff,	)	ORDER
vs.	)	(Filed Nov. 4, 1999)
KELLOGG USA, INC., and AMERICAN FEDERATION OF GRAIN MILLERS LOCAL NO. 50,	)	
Defendants.	)	

This matter is before the court on the following motions:

Plaintiff's motion to compel production of documents and for sanctions (Filing No. 94);

Plaintiff's motion to reconsider order denying motion for production (Filing No. 95);

Plaintiff's motion to reconsider order denying demand for jury trial (Filing No. 99); and

Background

The plaintiff proceeds *pro se*. This action arises out of the plaintiff's employment relationship with the defendant Kellogg USA, Inc. (Kellogg). The plaintiff was employed at Kellogg's Memphis factory until February 1996, when she transferred to the Omaha facility. In September 1996, Kellogg and American Federation of Grain Millers (AFMG) began negotiating a master bargaining

agreement. On September 28, 1999, the date the prior agreement was to expire, the Union members approved a strike to begin at midnight if a new agreement was not reached. Kellogg states, on that night, the plaintiff's line, Line 109, was sabotaged. Kellogg states another employee, Joyce Platt, accused the plaintiff and Don Jackson (Jackson) of the intentional sabotage. Kellogg states Tim Silsbee, the Director of Human Resources, investigated that incident and other incidents of sabotage. The investigation led to the plaintiff's suspension and eventual termination from Kellogg.

Jackson and another employee, Peggy Welch, were also terminated for sabotage. The plaintiff and AFGM jointly filed a grievance, which went through arbitration. The plaintiff was reinstated with Kellogg, but did not receive an award of backpay. Jackson was reinstated with backpay. The plaintiff now seeks relief under Title VII of the Civil Rights Act based upon racial and gender discrimination. **See** Filing No. 1.

Plaintiff's Motion To Compel Production Of Documents And For Sanctions (Filing No. 94)

The plaintiff served the defendant Kellogg with her Third Request for Production of Documents on August 6, 1999. The plaintiff moves this court to compel production[1]

---

[1] The plaintiff argues it was not necessary for her to comply with NELR 7.1(i) because the court had previously addressed her production concern. **See** Plaintiff's Reply, p. 13-14. The court cautions the plaintiff she is required to comply with NELR 7.1(i) with regard to all of her discovery motions. Moreover, this

for Request Nos. 17-37.[2] **See** Filing No. 94. The defendant responded to each request that it is "overly broad, vague and unduly burdensome." And "further objects . . . that [each] is not reasonably calculated to lead to the discovery of admissible evidence." **See** Filing No. 94, Exhibit B. The court has received a motion and brief[3] from the plaintiff and a brief from the defendant Kellogg.

Analysis

Fed. R. Civ. P. 34 provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served[.]

---

court has not previously addressed Request Nos. 17-37, specifically, as raised in Filing No. 94. The plaintiff's prior motion to compel addressed Request Nos. 2-15.

[2] The requests are misnumbered. There are two numbered 29. The court will consider the second 29 as 30 and so forth, as done by the parties.

[3] The plaintiff submitted a document entitled, "Plaintiff's Response to Defendant Kellogg's Brief in Opposition to Plaintiff's Motion to Compel" on October 12, 1999. The submission, if intended to be a reply brief, is not supported by a motion to allow a reply pursuant to NELR 7.1(c). However, the court finds the document helpful to narrow the issues raised in the plaintiff's motion to compel and deems the document Plaintiff's Reply Brief.

* * *

> The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The court first must determine whether the documents sought are relevant to this case. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy, for purposes of discovery, has been defined by the United States Supreme Court as encompassing "any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." ***Oppenheimer Fund, Inc. v. Sanders***, 437 U.S. 340, 351 (1978). Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any

issue in the case and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action. **See** ***Marker v. Union Fidelity Life Ins. Co.***, 125 F.R.D. 121, 124 (M.D.N.C. 1989); ***Morse Diesel, Inc. v. Fidelity & Deposit Co.***, 122 F.R.D. 447, 449 (S.D.N.Y. 1988). "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." ***Hickman v. Taylor***, 329 U.S. 495, 507 (1947). "To assess relevance in a given case, the court must view the matter in light of the specific claims and defenses asserted by the parties." ***Fletcher v. Atex, Inc.***, 156 F.R.D. 45, 48 (S.D.N.Y. 1994) (citations omitted). However, a threshold showing of relevance is necessary before production of information, which does not reasonably bear on the issues in the case, is required. ***Hofer v. Mack Trucks, Inc.***, 981 F.2d 377, 380 (8th Cir. 1993). Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case. **See** ***Cervantes v. Time, Inc.***, 464 F.2d 986, 994 (8th Cir. 1972).

The party opposing the motion to compel has the burden to show that its objections are valid by providing explanation or factual support. ***Burnett v. Western Resources Inc.***, 1996 WL 134830, *4 (D.Kan. 1996). "Bare assertions that discovery requested is overly broad, unduly burdensome, oppressive or irrelevant are ordinarily insufficient . . . to bar production." ***Pulsecard, Inc. v. Discover Card Services, Inc.***, 1996 WL 397567 *1, 2 (D.Kan. 1996), **quoting** ***Continental Ill. Nat'l Bank & Trust v. Caton***, 136 F.R.D. 682, 685 (D.Kan. 1991). "The

ritual use of language such as 'overly broad and burdensome' in boilerplate 'general objections' to document requests raises no meaningful issue, and affords no legally sufficient basis for refusing to produce documents within the scope of the request." ***Flynn v. Goldman, Sachs, & Co.***, 1991 WL 238186 *1, 3 (S.D.N.Y. 1991), citing ***AT&T v. New York City Human Resources Admin.***, 1991 WL 79461 at *5 (S.D.N.Y. 1991).

It is insufficient for the party objecting to discovery based on relevance to simply make conclusory allegations that the request is irrelevant. ***Burnett v. Western Resources Inc.***, 1996 WL 134830, *4 (D.Kan. 1996). If the discovery sought appears relevant, the opposing party bears the burden of specifically show how each discovery request is irrelevant. ***Id.***

Requests should identify categories of documents with reasonable precision. ***Schartz v. Unified School District No. 512***, 1996 WL 741384, *1 (D.Kan. 1996). "If an omnibus phrase modifies a sufficiently specific type of information or documents, the request may survive an objection that it is overly broad." ***Id.*** (concluding request seeking all documents used to calculate damages and request seeking all documents for the plaintiffs accounts were sufficiently precise). Finally, the District Court has discretion to limit the scope of discovery, if it has a good reason to do so. ***Credit Lyonnais v. SGC Int'l, Inc.***, 160 F.3d 428, 431 (8th Cir. 1998).

Discussion

The court has reviewed the plaintiff's requests and Kellogg's responses and will evaluate each request individually as follows:

Request No. 17: In Request No. 17 the plaintiff seeks copies of financial records for Don Jackson, an employee of Kellogg. The plaintiff argues this information is relevant because Don Jackson stated in front of witnesses that he had not been discharged but suspended with pay. **See** Plaintiff's Reply, p. 14. The plaintiff has failed to make a threshold showing how a nonparty's financial records reasonably bear on the issues in this case. **See *Hofer***, 981 F.2d at 380. Additionally, as a general rule, the confidential information kept about nonparty employees is not discoverable. **See *Knoll v. American Tel. & Tel. Co.***, 176 F.3d 359, 365 (6th Cir. 1999) (Plaintiff not allowed to discover personnel file of a nonparty employee.). The plaintiff seeks confidential financial information of a nonparty. For these reasons, no further response to Request No. 17 will be required.

Request No. 18: In Request No. 18 the plaintiff seeks each EEOC complaint and attendant law suit from 1988 to 1998, limited to the Omaha facility. **See** Filing No. 94, Exhibit B; Plaintiff's Reply, p. 14-15. The plaintiff has failed to make a threshold showing that such information regarding all EEOC complaints and law suits are relevant as is required by law. ***Hofer***, 981 F.2d at 380. The plaintiff has not explained with any specificity how such information is important to her case. **See *Cervantes***, 464 F.2d at

994. Generally, confidential information about non-parties is not discoverable. **See *Knoll***, 176 F.3d at 365. Additionally, Kellogg argues the size of its operations makes this request unduly burdensome because it has five cereal plants and thousands of employees. See Kellogg's Brief, p. 5. Kellogg's objection is sustained. The court finds any marginal relevance of the information requested is outweighed by the undue burden on Kellogg of producing.

Request Nos. 19, 20, 23, 27 and 33: In Request No. 19 the plaintiff seeks "records of each and every malfunction or mechanical break down to each and every piece of equipment for [the] bag in the box lines, large or family lines, combines or individual" for the period 1989 through 1999 including invoices for parts, documentation for down time, and name, address, gender and race of each employee reprimanded for the malfunction or breakdown. In Request No. 20 the plaintiff seeks records for downtime for light weight and/or heavy food bag in the box lines. Request No. 23 appears duplicative of Request Nos. 19 and 20, and therefore is included to the extent it is the same. However, to the extent the scope of Request 23 exceeds Request Nos. 19 and 20 as set forth herein, no further response is required of Kellogg. Request No. 27 seeks documents listing the common problems with bag in the box lines. In Request No. 33 the plaintiff seeks records showing the down time for lines 109 and 111 from the date of the Honey Crunch start up through December 1998 including the name, address, race and gender of any employee suspended or discharged.

The plaintiff states she attempts to show that the bag in the box lines suffer from regular breakdowns unrelated to sabotage, of which she was accused, and that the

operators of the other lines suffering breakdowns were not accused of sabotage. **See** Plaintiff's Reply, p. 15. The plaintiff merely speculates that such information will be helpful in her case without a threshold showing of relevance describing with a reasonable degree of specificity that the information for all lines is important to this case. **See** ***Hofer***, 981 F.2d at 380; ***Cervantes***, 464 F.2d at 994. Moreover, confidential personnel information is generally not discoverable unless the [sic] similar in type to the plaintiff. **See** ***Knoll***, 176 F.3d at 365; ***Onwuka***, 178 F.R.D. at 508. The court, however, finds information related to the product line at issue, Line 109, except for repair parts, is relevant to the case.

Finding the request relevant, in part, Kellogg then has the burden of supporting its objections of overbreadth, vagueness and undue burden with a factual basis. **See** ***Pulsecard***, 1996 WL 397567 *1, 2. Kellogg argues that the request is unlimited as to scope including number of lines, time periods, and records. **See** Kellogg's Brief, p. 6. Kellogg has produced no evidence or factual support for its objections. Accordingly, Kellogg's objections are overruled. However, the court finds good reason, in its discretion, to limit the plaintiff's request. **See** ***Credit Lyonnais***, 160 F.3d at 431.

Therefore, Kellogg shall produce all records of malfunctions, mechanical break downs, down time, and common problems for Line 109, including the race and gender of each employee discharged or suspended for causing the malfunction, breakdown or down time. Kellogg may redact the name, address and any other confidential or personal identifying information from the records. The court further limits the request to the Omaha

facility and for the period 1994 through 1998. **See** ***Hicks v. Arthur***, 159 F.R.D. 468, 471 (E.D.Pa. 1995) (finding two year time period surrounding employment action reasonable).

Request No. 21: Request No 21 states:

> Kellogg Company is to produce complete copies of an accounting for the purchase of nuts and bolts and screws and such in detail by showing the number of each purchased during the period January 1994 through December 1998 and an accounting for inventory control as to the number used and the number still stocked.

The plaintiff argues this request is relevant to Kellogg's charge of sabotage against the plaintiff including finding, "nuts and bolts and screws all over the floor." **See** Plaintiff's Reply, p. 15. Additionally, the plaintiff argues nuts, bolts and screws used in the bag in the box lines loosen and fall to the floor merely through the operation of the machines. **See** Plaintiff's Reply, p. 16. The court fails to observe the significance of the number of nuts, bolts and screws purchased and in stock over a four year period is evidence of or relates to discrimination in this case. The plaintiff fails to make a threshold showing of relevance. **See** ***Hofer***, 981 F.2d at 380. No further response by Kellogg is required.

Request No. 22: In Request No. 22 the plaintiff seeks any record showing hourly employees were informed of the status of Kellogg's Honey Crunch product. The plaintiff states such information is relevant because Kellogg "alleged that this Plaintiff knew that Honey Crunch was a critical Product and involved in a nation wide promotion

and that if there were to be production the lines that ran Honey Crunch would be the lines to sabotage." **See** Plaintiff's Reply, p. 16. The court finds the plaintiff has met her burden of showing how the information requested reasonably bears on the on the [sic] issues in the case. **See** ***Hofer***, 981 F.2d at 380. Kellogg offers no factual basis in support of its objections. **See** ***Pulsecard***, 1996 WL 397567 *1, 2. Therefore, Kellogg's objections are overruled and Kellogg shall respond to this request in full.

Request No. 24: In Request No. 24 the plaintiff seek two types of information. The first type is records showing whether the plaintiff was or was not a qualified operator of the bag in the box equipment. This information is relevant and should be produced. Kellogg states it "believes" the information was included in the plaintiff's personnel file produced on September 24, 1999, ten days subsequent to the plaintiff's filing her motion to compel. **See** Kellogg's Brief, p. 7. To the extent Kellogg has not already produced such information it shall respond in full producing records about the plaintiff as sought in Request No. 24.

The second type of information sought in Request No. 24 pertains to all the other Kellogg employees who operated the bag in box equipment. The plaintiff fails to sustain her burden of showing how this information is relevant to the issues in the case. **See** ***Hofer***, 981 F.2d at 380. Additionally, confidential and personal personnel files of nonparties are generally not discoverable. **See** ***Knoll***, 176 F.3d at 365; ***Onwuka***, 178 F.R.D. at 508. No further response by Kellogg is required regarding the qualifications of all employees who operated the bag in the box equipment.

Request No. 25: In Request No. 25 the plaintiff seeks, "copies of Kellogg Company's hiring and firing policies, including procedures for each." This information is clearly relevant to the instant action. Kellogg, then, has the burden of demonstrating how its objections are valid by providing explanation or factual support. ***Burnett***, 1996 WL 134830, *4. Kellogg fails to provide support for its objections, but argues it "believes" it has already provided the documents to the plaintiff. **See** Kellogg's Brief, p. 7. The practice of responding to a request first by raising objections and then by proceeding to produce "results in an ambiguous response, since it cannot be determined whether the responding party has supplied a full and complete answer in spite of the objection, or a partial or incomplete answer in reliance upon the objection. . . . [Such objections] are unsubstantiated and seemingly belied by the fact that [the party] was able to provide an answer." ***Burton Mechanical Contractors, Inc. v. Foreman***, 148 F.R.D. 230, 233 (N.D.Ind. 1992). Kellogg's response belies its objections. Therefore, Kellogg shall respond to Request No. 25 in full.

Request No. 26: In Request No. 26 the plaintiff seeks the name, address, race and gender of all witnesses to a telephone conversation which occurred on October 15, 1996, where a Kellogg manager, Bob Birt, referred to the plaintiff as a liar. **See** Filing No. 94, Exhibit B; Kellogg's Brief, p. 7. The court finds the names and addresses of witnesses to such telephone conversation is relevant and may lead to the discovery of admissible evidence. However, the race and gender of the witnesses is not relevant. Kellogg's bare assertions that the request is overly broad, vague, unduly burdensome and irrelevant are again

insufficient for this court to sustain the objection to production. **See** ***Pulsecard,*** 1996 WL 397567 *1, 2. Kellogg's objections are overruled. Kellogg shall provide the name and address of any witness to the telephone conversation between Bob Birt and the plaintiff on October 15, 1996. Kellogg is exempt from including the race and gender of each witness.

Request Nos. 28 and 29: In Request Nos. 28 and 29 the plaintiff seeks information listing all supervisors and/or managers trained in the bag in the box area and the trainers and training manuals used. The plaintiff seeks this information to show that others besides Platt and Ondracek could have verified testimony regarding the bag in the box lines. **See** Plaintiff's Reply, p. 23-24. The court finds this information, in part, relevant to the underlying issues regarding the proper operation of Line 109. Kellogg fails to provide an explanation or factual support in support of its objections, which are therefore overruled. Kellogg shall supply the plaintiff with the training manual used for Line 109 and a list of supervisors and/or managers who are trained for and typically supervise Line 109 in response to Request Nos. 28 and 29.

Request No. 30: In Request No. 30 the plaintiff seeks dates and times for the bag in the box lines to be available for observation during the trial of this case. This issue is currently before the court on the plaintiff's motion for same (Filing No. 71). As such no further response to Request No. 30 is required by Kellogg at this time.

Request No. 31: In Request No. 31 the plaintiff seeks complete employment records of the employees working on September 28, 29 and 30th. **See** Filing No. 94, Exhibit

B. This court restates the principle that the confidential information kept in personnel files is not discoverable. **See** *Knoll*, 176 F.3d at 365. Furthermore, the plaintiff has failed to state beyond mere speculation how these records are reasonably related to the claims at issue in this case. As such, no further response to Request No. 31 by Kellogg is required.

Request No. 32: In Request No. 32 the plaintiff seeks complete copies of savings and investment policies, and records of employees who were discharged or suspended including whether those employees were allowed access to their savings and investment funds. **See** Filing No. 94, Exhibit B. The plaintiff argues Kellogg did not allow her access to her savings and investment funds by preventing her from filling out forms. **See** Plaintiff's Reply, p. 24-25. The plaintiff has failed to state beyond mere speculation how these records of nonparties are reasonably related to the claims at issue in this case. As such, no further response to Request No. 32 by Kellogg is required.

Request No. 35: Request No. 35 states,

> Kellogg Company is to produce copies of each and every document, and evidence, and proof which shows that Line 109 was sabotaged on the night of September 28th, 29th, 30th 1996?

This information is clearly relevant to the issues in this case. Kellogg states it "believes that these documents were substantially produced to Plaintiff on September 24, 1996." **See** Kellogg's Brief, p. 11. The court assumes Kellogg meant 1999, as in prior responses. To the extent

Kellogg has not produced it shall fully respond to Request No. 35.

Request Nos. 34, 36 and 37:

Request No. 34 states:

> Kellogg Company is to produce complete copies of its POLICIES, RULES, REGULATIONS, ETC. which all Kellogg Company to fire its employees, based on the judgement of Kellogg Company managers with no evidence.

Request No. 36 states,

> Kellogg Company is to produce the authority which allows the Kellogg Company the authority to violate the Civil Rights of its employees.

Request No. 37 states,

> Kellogg Company is to produce the authority which allows the Kellogg Company the authority to violate the Civil Rights of Vishnue I. Jennings.

As in Kellogg's other responses it objects on the grounds of overbreadth, vagueness undue burden and irrelevance, but adds, it objects because, "Kellogg does not violate the Civil Rights of its employees" and "did not violate the Civil Rights of Vishnue I. Jennings." In its brief, Kellogg further states, "this request is a legal conclusion and editorialization by Plaintiff – not a proper request for production of documents." See Kellogg's Brief, p. 11. The court finds these requests are not proper. No further response is required for Request Nos. 34, 36 or 37.

Plaintiff's Motion To Reconsider Order Denying Demand For Jury Trial (Filing No. 99)

The plaintiff made a demand for a jury trial on July 19, 1999. **See** Filing No. 58. Both defendants moved to strike the jury demand. **See** Filing Nos. 60 and 65. In the court's order of September 3, 1999, this court struck the plaintiff's demand for a jury trial. **See** Filing No. 91. The plaintiff now seeks reconsideration for the September 3, 1999 order striking the jury demand. **See** Filing No. 99.

A motion for reconsideration is not provided in the Federal Rules of Civil Procedure. ***Sanders v. Clemco Indus.***, 862 F.2d 161, 170 (8th Cir. 1988). However,

> A motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts or applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence. ***Anderson v. United Auto Workers***, 738 F. Supp. 441, 442 (D.Kan. 1990); ***Taliaferro v. City of Kansas City***, 128 F.R.D. 675, 677 (D.Kan. 1989). An improper use of the motion to reconsider "can waste judicial resources and obstruct the efficient administration of justice." ***United States ex rel. Houck v. Folding Carton Administration Committee***, 121 F.R.D. 69, 71 (N.D.III. 1988). Thus, a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider. ***Renfro v. City of Emporia***, 732 F. Supp. 1116, 1117 (D.Kan. 1990); ***Butler v. Sentry Insurance***,

> 640 F. Supp. 806, 812 (N.D.Ill. 1986). The court is not required to supply the rationale that the parties were unable to find. **See** ***Drake v. City of Fort Collins***, 927 F.2d 1156, 1159 (10th Cir. 1991) ("court will not construct arguments or theories for the [litigants] in the absence of any discussion of those issues").

Schrag v. Dinges, 144 F.R.D. 121, 122 (D.Kan. 1992) (holding the magistrate judge correctly denied a motion to reconsider denial of motion to amend when plaintiff raised facts for the first time which were previously available to argue at the time of the original motion).

For example, in ***Caruthers v. Proctor & Gamble Mfg. Co.***, 1997 WL 118444 *1, 1 (D.Kan. 1997), the court addressed the plaintiff's motion to reconsider the court's order overruling his motion to compel. The court stated:

> Whether to reconsider a previous order of the court rests within the sound discretion of the court. ***Hancock v. City of Okla. City***, 857 F.2d 1394, 1395 (10th Cir. 1988). "In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." ***Martin v. Mapco Ammonia Pipeline, Inc.***, 866 F. Supp.1304, 1308 (D.Kan. 1994). . . .

Caruthers, 1997 WL 118444 at *2. The movant has the "burden to show that . . . new evidence is available. . . . " ***Id.*** at *3 (citations omitted). **See also** ***Pick v. American Med. Sys., Inc.***, 1997 WL 162061 *1, 1 (E.D.La. 1997).

> [Motions to reconsider] are "extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged." ***In re August, 1993 Regular Grand Jury***, 854 F. Supp. 1403, 1406 (S.D.Ind. 1994). To be sure, "a court can always take a second look" at a prior decision; but "it need not and should not do so in the vast majority of instances," especially where such motions "merely restyle or rehash the initial issues." ***Id.*** at 1407. It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or "to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue." ***Id.*** at 1408.

McConocha v. Blue Cross & Blue Shield Mutual of Ohio, 930 F. Supp. 1182, 1184 (N.D.Ohio 1996). In ***McConocha***, the court noted that in its motion for reconsideration, the defendant relied on additional evidence, but failed to show why the evidence was not presented before the original order. ***Id.*** The court concluded, "[b]ecause a motion to reconsider should not be used to proffer new evidence to support a prior argument when it could have been offered initially, this new evidence should be disregarded. When it is, the motion can be, and hereby is overruled." ***Id.***

"The party moving for reconsideration has the 'burden to show that . . . new evidence is available. . . . ' " ***Wooten v. Board of Public Util.***, 1997 WL 45275 at *1, 2

(D.Kan. 1997) (citations omitted). "The new evidence presented must not have been able to have been appropriated when the matter was previously decided through 'exercise of due diligence.' " ***Ianelli v. Chrysler Corp.***, 1996 WL 368317 *1, 1 (E.D.Pa. 1996), citing ***Koshatka v. Philadelphia Newspapers, Inc.***, 762 F.2d 329, 333 (3d Cir. 1985).[4]

---

[4] "When supplementing a Rule 59(e) motion with additional evidence, the movant must show either that the evidence is newly discovered [and] if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence." ***Committee for First Amendment v. Campbell***, 962 F.2d 1517, 1523 (10th Cir. 1992), quoting ***Chery v. Bowman***, 901 F.2d 1053, 1057-58 n. 6 (11th Cir. 1990). See also ***Russ v. Int'l Paper Co.***, 943 F.2d 589, 593 (5th Cir. 1991). In ***Campbell***, the Tenth Circuit held the district court did not abuse its discretion in denying plaintiffs' motion for reconsideration when the plaintiffs waited to submit additional evidence in a motion for reconsideration, failed to explain the delay, and therefore failed to meet their burden of showing the evidence was newly discovered or unavailable in a timely manner through diligence. ***Campbell***, 962 F.2d at 1524.

> [W]here a party seeks reconsideration on the basis of newly discovered evidence, the proponent must demonstrate that the newly discovered evidence was neither in his possession nor available upon the exercise of reasonable diligence at the time the interlocutory decision was rendered. The Court will not set aside a judgment because a frustrated litigant failed to present on a motion for summary judgment all facts known by or reasonably available to him. The test here is the same as under Federal Rule of Civil Procedure 60(b): If evidence was in the possession of the party before the judgment was rendered, or reasonably would have been available to him, it is not "newly discovered" and does not entitle him to relief.

In ***Hagerman v. Yukon Energy Corp.***, 839 F.2d 407, 409 (8th Cir.), **cert. denied**, 488 U.S. 820 (1988), the district court entered summary judgment for the plaintiff. The defendant filed a motion to alter or amend judgment raising new issues which the district court denied without opinion. ***Id.*** On appeal, the Eighth Circuit noted:

As the Seventh Circuit recently stated:

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative

---

11 Wright & Miller § 2859 at 182-83; **see also *Fay Corp. v. Bat Holdings I, Inc.***, 651 F. Supp. 307, 309 (W.D.Wash. 1987) ("Motions for reconsideration . . . are not justified on the basis of new evidence which could have been discovered prior to the Court's ruling.").

Tri-Star Pictures, Inc. v. Leisure Time Productions, 1992 WL 296314 *3 (S.D.N.Y. 1992), **aff'd**, (2d Cir.), **cert. denied**, 513 U.S. 987 (1994).

See also *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987) (finding the district court did not abuse its discretion in denying a motion to reconsider where the movant failed to show it had exercised due diligence in attempting to produce the so-called "new evidence," such as by asking for an extension of time to compile the evidence for the motion); ***Derechin v. State Univ. of New York***, 138 F.R.D. 362, 365 (W.D.N.Y. 1991); ***Barrett v. Fields***, 941 F. Supp. 980, 985 (D.Kan. 1996) (denying motion to reconsider where plaintiff failed to articulate an explanation for failing to submit the additional evidence before the court rendered its decision).

> duty to come forward to meet a properly supported motion for summary judgment. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.
>
> *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), **as amended**, 835 F.2d 710 (7th Cir. 1987) (**quoting** *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D.Ill. 1983), **aff'd**, 736 F.2d 388 (7th Cir. 1984)).

Id. at 414. The Eighth Circuit concluded the defendant did not contend it could not have raised the new issues or submitted the additional affidavits before filing the motion to amend. *Id.* The Eighth Circuit concluded the district court did not abuse its discretion in denying the motion to amend judgment. *Id.* **See also** *Doe v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 647 n.5 (8th Cir. 1990) (stating the district court properly denied plaintiffs' request to file a certain affidavit in support of a motion for reconsideration when the information in the affidavit was available before the entry of summary judgment). **Cf.** *Atkinson v. Prudential Prop. Co., Inc.*, 43 F.3d 367, 370 (8th Cir. 1994).

In *C. R. Bard, Inc. v. M3 Systems, Inc.*, 1994 WL 386819 at *1 (N. D. Ill. 1994), the court had denied the defendant's motion to compel production of documents. The defendant sought reconsideration of the motion. *C. R. Bard*, 1994 WL 386819 at *1. The court found the defendant presented no new evidence that it could not have presented during the original motion's pendency. *Id.* In denying the motion for reconsideration, the court stated the defendant "appears to consider the court's

ruling denying its motion to be a 'first draft, subject to revision and reconsideration at [the defendant's] pleasure.' " ***Id.***, **citing** ***Quaker Alloy Casting v. Gulfco Indus., Inc.***, 123 F.R.D. 282, 288 (N.D.Ill. 1988). **See also** ***Mike v. Dymon, Inc.***, 1997 WL 13664 (D.Kan. 1997).

In the present case, the plaintiff argues the constitution guarantees her a right to trial by jury because the value in controversy is greater than twenty dollars. **See** Filing No. 99. The plaintiff argues Fed. R. Civ. P. 38 cannot abrogate her right to a jury trial and that no waiver occurred pursuant to Fed. R. Civ. P. 38 because the "last pleading" has not yet been filed in this case. The defendant Kellogg submitted a brief in opposition, stating no rule allows for a motion to reconsider, therefore the plaintiff's motion should be denied. **See** Kellogg's Brief, p. 1-2.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. The Seventh Amendment applies to actions enforcing common law and statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. ***City of Monterey v. Del Monte Dunes at Monterey, Ltd.***, 119 S. Ct. 1624, 1637 (1999); ***Curtis v. Loether***, 415 U.S. 189, 194

(1974). Jury trials are available in Title VII claims if compensatory or punitive-damages are sought. **See** 42 U.S.C. § 1981a(c) (1994), as added by § 102 of the 1991 Act; ***Landgraf v. USI Film Products***, 511 U.S. 244, 248 (1994); **see generally *Hathaway v. Runyon***, 132 F.3d 1214, 1221 (8th Cir. 1997). Although the right of trial by jury is preserved by the Seventh Amendment to the United States Constitution, like all constitutional rights it can be waived by the parties. ***United States v. Moore***, 340 U.S. 616, 621 (1951). "Unlike other constitutional rights, however, an intentional relinquishment of the right is not required for waiver; the right to a jury trial can be waived by inaction or acquiescence." ***In re City of Philadelphia Litigation***, 158 F.3d 723, 726 (3d Cir. 1998). In this case the plaintiff has waived that right by failure to make a timely demand for a jury, as set forth more fully in this court's order (Filing No. 99).

The plaintiff misreads Fed. R. Civ. P. 38(b) to mean the jury demand must be made not ten days later than the last document filed in the case. The reference in Rule 38(b) is to the last pleading directed to the issue of a trial by the court or by a jury. In this case the last such pleading was the defendant Kellogg's answer filed September 11, 1998, nearly eleven months prior to the plaintiff's demand for a jury.

The plaintiff has failed to meet her burden, as required for reconsideration, of showing (1) an intervening change in controlling law; (2) availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. Therefore, her motion to reconsider demand for jury trial is denied.

Plaintiff's Motion To Reconsider Order Denying Motion For Production (Filing No. 95)

The plaintiff moves this court to reconsider its order dated September 3, 1999 (Filing No. 99), with regard to denying the plaintiff's motion to compel the personnel files of Joyce Platt and Greg Ondracek (Filing No. 57). The plaintiff states the facts of the case provide a showing of relevancy and good cause for compelling Kellogg to produce the personnel files. **See** Filing No. 95. The defendant Kellogg has submitted a brief in opposition to the plaintiff's motion arguing no federal or local rule provides for motions for reconsideration, and therefore the plaintiff's motion should be denied. **See** Kellogg's Brief, p. 1-2.

The plaintiff does not cite to a change in the law, raise any new evidence, or show clear error or manifest injustice with regard to the denial of her motion to compel the personnel files. Therefore, the plaintiff has failed to meet her burden of showing (1) an intervening change in controlling law; (2) availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice.

Even assuming, *arguendo*, arguements [sic] raised by the plaintiff are considered as new evidence and should be considered in evaluating the plaintiff's motion to compel, the court has reviewed the information included in the plaintiff's brief and finds the plaintiff failed to show the personnel files of nonparties are relevant to the claims at issue. In addition, any relevance would not outweigh the possible harm to the nonparties by disclosure of the

information as described in the court's first order denying the motion to compel. Therefore, the plaintiff's motion to reconsider denial of the motion to compel personnel files is denied.

Sanctions

The plaintiff requests fees for her motion in this matter pursuant to Fed. R. Civ. P. 37. Rule 37(a)(4) provides:

> (A) *If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed,* the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.
>
> * * *
>
> (C) *If the motion is granted in part and denied in part, the court may* enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, *apportion the reasonable expenses incurred in relation to the*

> *motion* among the parties and persons in a just manner.

Fed. R. Civ. P. 37(a)(4) (emphasis added).

"At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification." ***Advisory Committee Notes, Fed. R. Civ. P.*** 37(a)(4) (1970). The court notes that, in the present case, the motion will be denied. In viewing the circumstances of this case, the motion to compel, and the parties' briefs, the court finds some of the defendants' arguments were substantially justified[5] and no fees or costs should be awarded in this matter. Accordingly,

IT IS ORDERED:

1. Plaintiff's motion to compel production of documents (Filing No. 94) is denied in part and granted in part as set forth herein. The plaintiff's motion to compel supplemental responses to Request Nos. 17, 18, 21, 30, 31, 32, 34, 36 and 37 is denied. The plaintiff's motion to compel a supplemental responses to Request Nos. 19, 20, 22-29, 33 and 35 is granted.

2. The defendants shall have to **on or before November 19, 1999,** to provide supplemental responses as set forth herein.

3. Plaintiff's motion to reconsider order denying motion for production (Filing No. 95) is denied.

---

[5] "Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule." Charles A. Wright, et al., ***Federal Practice and Procedure*** § 2288 (2d ed. 1994).

4. Plaintiff's motion to reconsider order denying demand for jury trial (Filing No. 99) is denied.

5. The plaintiff's request for sanctions (Filing No. 94) is denied.

DATED this 4th day of November, 1999.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States Magistrate Judge